TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 513

THE UNITED STATES OF AMERICA EX REL. W. V. HUGHES, APPELLANT,

vs.

ROY B. GAULT, UNITED STATES MARSHAL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

FILED MAY 27, 1935

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[fols. 1 & 2] CITATION—In usual form, showing service on Ross R. Mowry; filed April 29, 1925; omitted in printing

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[fol. 3] [Caption omitted]

[fol. 4] **IN UNITED STATES DISTRICT COURT**

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI

To the Honorable the Judges of the said Court:

The petition of W. V. Hughes respectfully represents:

1. Your petitioner, W. V. Hughes, is a citizen of the United States and is a resident of the County of Jefferson, State of Iowa, in this District, where he has lived for 20 years.

2. Your petitioner is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the United States in the custody of Roy B. Gault, United States Marshal for the Southern District of Iowa, to wit, at Des Moines, in said District.

3. The sole claim and authority by virtue of which the said Roy B. Gault, United States Marshal, so restrains and detains your petitioner is a proceeding for a warrant of removal to be issued under Section 1014 Revised Statutes of the United States, for the purpose of removing your petitioner from the Southern District of Iowa to the Northern District of Ohio, Eastern Division, at Cleveland, the said proceeding having been instituted before United States Com-[fol. 5] missioner E. R. Mitchell. On December 20, 1924, your petitioner, pursuant to notice that his presence was required before said United States Commissioner, presented himself before the said Commissioner at Ottumwa, Iowa, and was then detained by color of the authority of the said Marshal. The sole claim and authority for the said arrest, restraint and detention was a certain instrument in writing purporting to be a warrant of commitment issued then and there by the said Commissioner, a copy of which warrant of commitment is hereto attached, made a part hereof and marked Exhibit "A."

4. Your petitioner further presents that the warrant aforesaid was issued upon the complaint of Ray C. Fountain, a copy of which complaint is hereto attached, made a part hereof and marked Exhibit "B"; that the said complaint is false and incorrect in many particulars; that your petitioner has never fled from the northern District of Ohio; that your petitioner has not been engaged, either personally or thru any corporation, firm of association, in interstate commerce in the Northern District of Ohio or in any combination with Robert E. Belt, the National Malleable Steel Castings Co. or any other defendant named in the Indictment referred to in said

complaint, whether corporation or individual, in restraint of interstate commerce in malleable iron castings; that on the contrary for three years and more preceding the filing of the indictment specified in the said complaint, neither your petitioner nor any corporation, firm or association with which he was connected has engaged in interstate commerce in malleable iron castings in the Northern District of Ohio or transacted business of any kind whatsoever in said District; that a copy of the said indictment is hereto attached, made a part hereof and marked Exhibit "C," which said indictment pretends to charge that your petitioner has, during the period from January 1, 1917, to the date of the finding of said indictment, to [fol. 6] wit, March 27, 1924, within the Northern District of Ohio, Eastern Division, engaged in an unlawful combination in restraint of interstate trade and commerce in malleable iron castings within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against unlawful Restraints and Monopolies."

5. Your petitioner further represents that he did not commit the crime of engaging with the persons or corporations named in said indictment or with any other persons or corporations whatsoever in any unlawful combination in restraint of interstate trade and commerce in malleable iron castings within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies," within said Northern District of Ohio, Eastern Division, during said period alleged in said indictment.

6. Your petitioner further avers that at no time during said period alleged in said indictment, as aforesaid, has he ever engaged in trade or business of any character in the Northern District of Ohio nor has the Iowa Malleable Iron Company (with which he is charged to have been affiliated as an officer or agent thereof) engaged in trade or business in the Northern District of Ohio during said period; that neither your petitioner nor the said corporation has during the said period entered into any agreement with any persons or corporations in regard to prices of products manufactured by your petitioner or the corporation with which he has been affiliated or as to allotting or assigning customers, nor has he or such corporation sought to enter into such an agreement in regard to such matters or any one or more of them in said District or elsewhere, during said period; and neither he nor the corporation with which he is affiliated, has [fol. 7] in any manner entered into any agreement or combination with any person or corporation which would in any manner tend to restrict or restrain trade in the Northern District of Ohio or anywhere else in the United States during said period.

7. Upon information and belief, your petitioner further represents that said complaint, Exhibit "B," did not and does not state any facts which constitute the crime of combining or conspiring in an unlawful combination in restraint of trade within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to Protect

Trade and Commerce against Unlawful Restraints and Monopolies" or of any other act of Congress.

8. Upon information and belief, your petitioner further represents that said indictment hereto attached as Exhibit "C" does not state an offense against the United States and does not charge any facts which constitute the crime of conspiring or combining in an unlawful combination in restraint of trade within the meaning of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies" or of any other act of Congress.

9. Upon information and belief, your petitioner further represents that said indictment hereto attached as Exhibit "C" pretends to charge violations of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and purports to charge that the corporations named as defendants have carried on interstate trade and commerce in malleable iron castings "in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves as to prices, terms and conditions of sale and as to customers," and further alleges that your [fol 8] petitioner and the other individual defendants affiliated with corporation defendants named in said indictment have been engaged in the management, direction and control of said corporation defendants, but your petitioner represents that said allegations, together with the other allegations contained in the said indictment, are not sufficient to charge your petitioner with having committed an offense under said Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" or any other act of Congress.

10. Upon information and belief, your petitioner further represents that said indictment hereto attached as Exhibit "C" is vague, uncertain and insufficient and does not show probable cause for believing that your petitioner has committed any offense against the United States in the Northern District of Ohio or elsewhere.

11. Your petitioner further represents upon information and belief that the evidence received before said United States Commissioner upon the hearing of said removal proceeding did not show or tend to show that your petitioner had committed any offense under said Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" or any other act of Congress.

12. Your petitioner further represents that your petitioner is detained under color of the authority of the United States as aforesaid after a hearing before said United States Commissioner at which hearing the evidence adduced in behalf of the United States consisted solely of the introduction of a properly certified copy of the indictment herein referred to as Exhibit "C" and the identification of [fol. 9] your petitioner as the person named in said indictment.

13. Your petitioner further represents that at said hearings before the Commissioner no evidence except as stated in the preceding paragraph hereof was adduced or sought to be adduced before said Commissioner in behalf of the United States, and no evidence was introduced or sought to be introduced tending to show probable cause as required by law to be shown as the condition precedent to the removal of your petitioner to another district from that in which he now resides or is confined, or tending to show that your petitioner committed any offense against the United States within the district known as the Northern District of Ohio, Eastern Division.

14. Your petitioner further represents that at said hearing before the Commissioner uncontradicted testimony was given under oath by your petitioner and other witnesses appearing on his behalf which tended to show that your petitioner has not, during said period alleged in said indictment, as aforesaid, engaged in any combination in restraint of interstate trade and commerce within the meaning of the Act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopolies," in the Northern District of Ohio or elsewhere.

15. Your petitioner further represents that at said hearing before said Commissioner E. R. Mitchell, after the United States of America had introduced said certified copy of said indictment and the identification of your petitioner as the person named in said indictment had been conceded, the following proceedings were had, to wit:

Your petitioner introduced the evidence of certain witnesses over objection made by the United States of America tending to show [fol. 10] that there was no combination in restraint of trade as alleged in said indictment and tending to negative each and every charge made in said indictment against this defendant and the corporation with which he is affiliated. That said evidence was received subject to the objection made by the United States of America that said evidence was immaterial, and irrelevant, and thereafter your petitioner was sworn and his evidence in chief attempted to show he was in no manner guilty of any charge made against him in said complaint or in said indictment and the corporation, the Iowa Malleable Iron Co., with which he is associated, had not been guilty of any of the charges made in said indictment. That objection to said line of evidence was made by the United States of America and ruling thereon withheld and said proceedings were adjourned to December 29, 1924, at 1:30 o'clock P. M.

That in the interval between the dates of said hearing, towit, December 20, 1924, and December 29, 1924, the said United States Commissioner, E. R. Mitchell filed his written opinion, a copy of which is hereto attached, and made part hereof, marked Ex. D holding said evidence already introduced on behalf of the defendant aforesaid to be immaterial and sustaining the objection made thereto by the United States of America and holding that further evidence by the defendant tending to show that neither he nor the corporation with which he was associated had been guilty of the crime charged was immaterial and striking out the evidence already introduced by

the defendant, to wit the testimony of the witnesses J. A. Scott and Jasper Blackburn and denying to this defendant the right to introduce evidence at said hearing tending to show a lack of probable cause for the removal of this defendant.

At said adjourned hearing on December 29, 1924, said Commissioner E. R. Mitchell refused to permit the defendant to introduce [fol. 11] evidence negativing the allegations of said indictment or tending to show that the defendant was innocent of the charges therein made or tending to show the lack of probable cause warranting the removal of this defendant.

All of which proceedings aforesaid were illegal and deprived the defendant of his constitutional rights as such defendant.

By reason of said holdings and the further holding of said Commissioner that said Indictment was a valid indictment and constituted probable cause for the removal of this defendant, an order was thereupon made by said Commissioner ordering this defendant to be held in the District Court of the United States, in and for the Southern District of Iowa, for removal to the District Court of the United States for the Northern District of Ohio, Eastern Division, at Cleveland, Ohio, which order and rulings were illegal and void and which order and rulings have deprived the defendant of his liberty and have resulted in his being placed in the custody of the said United States Marshal, Roy B. Gault, as aforesaid.

Wherefore, for the above and other reasons, your petitioner is advised and accordingly alleges that the proceedings before the United States Commissioner were void and that the commitment issued by said Commissioner was void, and your petitioner is now confined and deprived of his liberty in violation of the Constitution of the United States and in violation of the statutes of the United States.

Your petitioner therefore prays that a Writ of Habeas Corpus may be issued, directed to the said Roy B. Gault, Marshal of the United States as aforesaid, and to each and all of his deputies requiring him and them to bring and have your petitioner before [fol. 12] this court at a time to be by this court determined together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises; and that a writ of certiorari may at the same time issue, directed to the said E. R. Mitchell, United States Commissioner for the Southern District of Iowa, directing him to certify to this court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings which resulted in the issue of said commitment and that this court may proceed to determine the facts of this case in that regard and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require; and your petitioner will ever pray, etc.

Dated at Ottumwa, Iowa, this 29th day of December A. D. 1924.

(Sgd.) W. V. Hughes.

[fol. 13] Sworn to by W. V. Hughes. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO PETITION

Warrant to Apprehend

The President of the United States of America to the Marshal of the United States for the Southern District of Iowa and to his deputies or any or either of them:

Whereas, Ray C. Fountain, Assistant U. S. Attorney, has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the Southern District of Iowa, Ottumwa Division, charging that W. V. Hughes late of Fairfield, Jefferson County, in the State of Iowa, did, during the three years next preceeding the 27th day of March A. D. 1924, at — in said District, in violation of Section —, Sherman Anti-trust Act (Act of July 2, 1890) of the Revised Statutes of the United States, having been indicted in the Eastern Division of the Northern District of Ohio, for being engaged in an unlawful combination in restraint of trade and commerce in malleable iron castings, is charged with being a fugitive from justice contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said W. V. Hughes wherever found in your district, and bring his body forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said complaint, and that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 20th day of December, A. D. 1924.

Ernest R. Mitchell, United States Commissioner as Aforesaid. (Seal.)

Approved: Frank F. Nelson (or Wilson), Asst. United States Attorney, Southern District of Iowa.

[fol. 15] EXHIBIT "B" TO PETITION

BEFORE HON. E. R. MITCHELL, U. S. COMMISSIONER FOR THE OTTUMWA DIVISION OF THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff,

vs.

W. V. HUGHES, Defendant

Complaint on Removal

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

Before me, Judson E. Piper, a United States Commissioner for the Southern District of Iowa, personally appeared Ray C. Fountain,

Assistant United States Attorney for the Southern District of Iowa, who being first duly sworn, deposes and says, that during the three years next preceding March 27, 1924 in the Eastern Division of the Northern District of Ohio, one W. V. Hughes in violation of Act of Congress of July 2, 1890, known as the Sherman Anti-trust Law, did engage in an unlawful combination in restraint of interstate trade and commerce in malleable iron castings.

That on the 27th day of March, 1924, the said W. V. Hughes was indicted for the said offense by the grand jury of the United States for the Eastern Division of the Northern District of Ohio.

[fol. 16] That said combination as aforesaid was engaged in contrary to the form of the statute in such case made and provided and contrary to the peace and dignity of the United States.

That said W. V. Hughes has fled from the said Northern District of Ohio, and is now within the limits of this judicial district.

That the foregoing information, except as to the fact of the said W. V. Hughes now being within this judicial district, is laid upon information and belief, the sources of deponent's information and the grounds of his belief being a certified copy of an indictment returned and found by the grand jury of the United States for the Eastern Division of the Northern District of Ohio, which said certified copy together with a copy of the warrant issued by the court thereon, is hereto attached and made a part of this complaint and filed with the same.

Ray C. Fountain.

Sworn to before me, and subscribed in my presence, this 17th day of December A. D. 1924. Judson E. Piper, United States Commissioner. (Seal.)

United States Commissioner E. R. Mitchell will issue a warrant, on the within complaint, for the arrest of W. V. Hughes.

Ray C. Fountain, Assistant U. S. District Attorney, Southern District of Iowa.

Dated Dec. 17, 1924.

[fol. 17] THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the Marshal of the Northern District of Ohio, Greeting:

We command you that you apprehend W. V. Hughes, care Iowa Malleable Iron Co., Fairfield, Iowa, and him immediately have before the District Court of the United States for the Northern District of Ohio at Cleveland, Ohio to answer unto an indictment pending in said Court, and filed March 27, 1924, for violation of the Sherman Anti Trust Act contrary to the form of the statute in such case made and provided, and against the peace, government and dignity of the United States. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness, the Honorable John M. Killits, D. C. Westenhaver and the Honorable Paul Jones, United States District Judges, Northern [fol. 18] District of Ohio, this 23rd day of April A. D. 1924, and in the 148th year of the Independence of the United States of America.

B. C. Miller, Clerk, by (Sgd.) W. B. Salsgiver, Deputy Clerk. (Seal.)

Filed January 7, 1925. N. F. Reed, Clerk, by (Sgd.) Victoria Darrell, Deputy.

[fol. 19] EXHIBIT "C" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, OF THE FEBRUARY TERM, IN THE YEAR 1924

NORTHERN DISTRICT OF OHIO,
Eastern Division, ss:

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Ohio, at the February Term of said court in the year 1924, and inquiring for said division and district, upon their oath present, that throughout the period of time extending from January 1, 1917, to and including the day of the finding and presentation of this indictment, malleable iron castings, bought and used extensively by manufacturers of automotive vehicles and machinery, railroad equipment, agricultural implements, and various other kinds of vehicles, machinery, tools, and apparatus (hereinafter referred to collectively as purchasers), have been manufactured in large quantities by certain corporations, a list of which, showing their corporate names, the States of their incorporation and the location of their several foundries, is as follows, to wit:

[fol. 19a]

NAME	STATE OF INCORPORATION	LOCATION OF FOUNDRIES
National Malleable and Steel Castings Company.	Ohio	Cleveland and Toledo, Ohio; Chicago and East St. Louis, Ill.; Indianapolis, Ind.
The National Malleable Castings Company	..do.	Cleveland and Toledo, Ohio; Chicago and East St. Louis, Ill.; Indianapolis, Ind.
The Eastern Malleable Iron Company, also trading as Bridgeport Malleable Iron Works, Naugatuck Malleable Iron Works, Troy Malleable Iron Works, Wilmington Malleable Iron Yorks, and Vulcan Iron Works.	Connecticut	Bridgeport, Naugatuck and New Britain, Conn.; Troy, New York; Wilmington, Del.
The Dayton Malleable Iron Company	Ohio	Dayton and Ironton, Ohio.
Albany Malleable Iron Company	New York	Albany, New York.
The Albion Malleable Iron Company	Michigan	Albion, Michigan.
The American Malleable Castings Company	Ohio	Marion, Ohio.
Badger Malleable & Manufacturing Company	Wisconsin	South Milwaukee, Wis.
Belle City Malleable Iron Company	do.	Racine, Wis.
Chicago Steel Castings Company (formerly named Chicago Malleable Castings Company).	Illinois	West Pullman, Chicago, Ill.
The Columbus Malleable Iron Company	Ohio	Columbus, Ohio.
Danville Malleable Iron Company	Illinois	Danville, Ill.
Decatur Malleable Iron Co.	....do.	Decatur, Ill.
Thomas Devlin Manufacturing Company	New Jersey	Philadelphia, Pa.
Erie Malleable Iron Co.	Pennsylvania	Erie, Pa.

NAME	STATE OF INCORPORATION	LOCATION OF FOUNDRIES
[fol. 19b] Federal Malleable Company	Wisconsin	West Allis, Wis.
Fort Pitt Malleable and Grey Iron Company	Pennsylvania	Pittsburgh, Pa.
Frazer & Jones Company.....	New York	Syracuse, N. Y.
Illinois Malleable Iron Company.....	Illinois	Chicago, Ill.
Iowa Malleable Iron Co.	Iowa	Fairfield, Iowa.
Kalamazoo Malleable Iron Co.	Michigan	Kalamazoo, Mich.
The Kennedy Corporation, also trading as Baltimore, Malleable Iron & Steel Casting Co.	Maryland	Baltimore, Md.
Laconia Car Company	Massachusetts	Laconia, N. H.
Lakeside Malleable Castings Company.....	Wisconsin	Racine, Wis.
Lancaster Foundry Company.....	Pennsylvania	Lancaster, Pa.
The Marion Malleable Iron Works.....	Indiana	Marion, Ind.
Meeker Foundry Company	New Jersey	Newark, N. J.
Moline Malleable Iron Co.	Illinois	St. Charles, Ill.
Northern Malleable Iron Co.	Minnesota	St. Paul, Minn.
Northwestern Malleable Iron Company	Wisconsin	Milwaukee, Wis.
Pittsburgh Malleable Iron Company	Pennsylvania	Pittsburgh, Pa.
Rhode Island Malleable Iron Works	Rhode Island	Hillsgrove, R. I.
Rockford Malleable Iron Works	Illinois	Rockford, Ill.
Ross-Meehan Foundries	Tennessee	Chattanooga, Tenn.
St. Louis Malleable Casting Company	Missouri	St. Louis, Mo.

The Standard Wheel Company, also trading as Standard Malleable Castings Co.	Indiana	Terre Haute, Ind.
[fol. 20] Stanley G. Flagg & Co., Inc.	Pennsylvania	Philadelphia, Pa.
The Stowell Company	Wisconsin	South Milwaukee, Wis.
The Springfield Malleable Iron Company	Ohio	Springfield, Ohio.
Temple Malleable Iron & Steel Company	Pennsylvania	Temple, Pa.
The Trenton Malleable Iron Company	New Jersey	Trenton, N. J.
Vermillion Malleable Iron Company	Illinois	Hoopeston, Ill.
Wanner Malleable Castings Company	....do.	Hammond, Ind.
Wisconsin Malleable Iron Co.	Wisconsin	Milwaukee, Wis.
The Zanesville Malleable Company	Ohio	Zanesville, Ohio.
The Union Malleable Iron Company	Illinois	East Moline, Ill.
The Warren Tool and Forge Company	Ohio	Warren, Ohio.

all of which said corporations are made defendants to this indictment; that the above-named corporations during said period of time, together have manufactured approximately 500,000 tons of said malleable iron castings annually, that is to say, approximately 75 per cent of all such castings manufactured in the United States; that said corporations, throughout said period of time, have sold large quantities of said malleable iron castings so manufactured by them to purchasers in States other than the State or States in which they were so manufactured, and have, in pursuance of said sales, shipped such castings from the several States wherein they have been so manufactured to said purchasers thereof in such other states; [fol. 21] that many of said corporations, throughout said period of time, have sold and shipped large quantit-es of said malleable iron castings from other states than said State of Ohio to purchasers in said Eastern Division of said Northern District of Ohio; that said purchasers in other states than said states of manufacture to whom said malleable iron casings have been so sold and shipped by said corporations are so numerous that it is impracticable to set forth their names in this indictment; that said corporations, throughout said period of time, in so selling and shipping the malleable iron castings manufactured by them as aforesaid to purchasers in States other than those in which the said castings were so manufactured, have carried on trade and commerce among the several States of the United States within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"; and that, because said corporations, in so carrying on said trade and commerce have been, throughout said period of time, separate entities, independent of each other, as the grand jurors upon their said oath charge the fact to be, they should have competed with each other fully and should have refrained from engaging in any unlawful combination in restraint of said interstate trade and commerce such as that hereinafter described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporations, throughout the said period of time, respectively have had divers officers and agents who have been actively engaged in the management, direction, and control of their affairs and business and of their said interstate trade and commerce, and that a list of the names of such officers and agents, so far as they are known to said grand jurors (Christian names un- [fol. 22] known to said grand jurors being indicated by initial letters), showing with which of said corporations they have been affiliated during said period of time, is as follows, to-wit:

Name	Affiliation
S. L. Smith	National Malleable and Steel Castings Company, and The National Malleable Castings Company.
C. L. Berger	The Eastern Malleable Iron Company.
P. J. Schilling	The Eastern Malleable Iron Company.
J. C. Haswell	The Dayton Malleable Iron Company.
Frederick V. Griesman	Albany Malleable Iron Company.
H. B. Parker	The Albion Malleable Iron Company.

Name	Affiliation
Carl F. La Marche	The American Malleable Castings Company.
A. J. Ricker	Badger Malleable & Manufacturing Company.
C. S. Anderson	Belle City Malleable Iron Company.
John T. Llewellyn	Chicago Steel Castings Company, formerly named Chicago Malleable Castings Company.
George H. Thompson	The Columbus Malleable Iron Company.
H. C. Smith	Danville Malleable Iron Company.
Donald E. Willard	Decatur Malleable Iron Co.
Louis J. McGrath	Thomas Devlin Manufacturing Company
E. E. Walker	Erie Malleable Iron Company.
O. L. Hollister	Federal Malleable Company.
Frank J. Lanahan	Fort Pitt Malleable and Grey Iron Company.
Fred Frazer	Frazer & Jones Company.
J. R. Steneck	Illinois Malleable Iron Company.
W. V. Hughes	Iowa Malleable Iron Company.
E. C. Howell	Kalamazoo Malleable Iron Co.
Joseph P. Kennedy	The Kennedy Corporation.
E. J. Fitzgerald	Laconia Car Company.
John G. Osborne	Lakeside Malleable Casting Company.
[fol. 23] H. Lloyd Hess	Lancaster Foundry Company.
Edwin F. Leigh	The Marion Malleable Iron Works.
Stephen J. Meeker	Meeker Foundry Company.
R. R. Fauntleroy	Moline Malleable Iron Company.
Frank J. Ottis	Northern Malleable Iron Company.
William C. McMahon	Northwestern Malleable Iron Company.
John B. Coates	Pittsburgh Malleable Iron Company.
H. L. Steeves	Rhode Island Malleable Iron Works.
F. C. Rutz	Rockford Malleable Iron Works.
G. F. Meehan	Ross-Meehan Foundries.
Henry Luedinghaus, Jr.	St. Louis Malleable Castings Company.
Todd T. Zachary	The Standard Wheel Company.
A. E. Shaw	Stanley G. Flass & Co., Inc.
Rupert A. Nourse	The Stowell Company.
T. W. Ludlow	The Springfield Malleable Iron Company.
Edwin C. Donaghy	Temple Malleable Iron & Steel Company.
Frank J. Eppele	The Trenton Malleable Iron Company.
F. C. Moore	Vermillion Malleable Iron Company.
Harry C. Wanner	Wanner Malleable Castings Company.
W. P. Westenberg	Wisconsin Malleable Iron Co.
P. A. Kern	The Zanesville Malleable Company.
J. L. Simmon	The Union Malleable Iron Company.
E. T. Ward	The Warren Tool and Forge Company.

and said officers and agents are also made defendants to this indictment.

And the grand jurors, aforesaid, upon their oath aforesaid, do further present, that, throughout said period of time, Robert E. Belt has been Secretary of The American Malleable Castings Association hereinafter mentioned, a voluntary trade organization with head-[fol. 24] quarters at Cleveland, in said division and district, of which each of said corporations above listed throughout said period has been a member, and through, and by means of which the unlawful combination hereinafter more fully described has been largely carried out; said Robert E. Belt also being made a defendant to this indictment, because he has, throughout said period, been actively engaged in the management, direction, and control of the affairs of said association, and has participated in said unlawful combination.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that continuously throughout said period of time, and therefore throughout the three years next preceding the finding and presentation of this indictment, at and within said Eastern Division of said Northern District of Ohio, said corporate defendants, said individual defendants, and said Robert E. Belt, each then well knowing all the premises aforesaid, unlawfully have engaged in a combination in restraint of said interstate trade and commerce in malleable iron castings so carried on by said corporate defendants, that is to say, in a combination now here described in restraint of, and which throughout said period of time, has unlawfully restrained said trade and commerce, in the manner hereinafter set forth:

Throughout said period of time said corporate defendants, under said management, direction, and control of their said officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporation to eliminate competition among themselves as to prices, [fol. 25] terms and conditions of sale, and as to customers; and by agreement have from time to time fixed excessive and non-competitive prices to be charged by all of them for said castings, have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers, and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that, as a means of securing compliance on the part of each of said corporate defendants with the terms of said agreements, said corporate defendants, throughout said period of time, have been members of and have maintained an organization known as The American Malleable Castings Association, with headquarters at Cleveland, Ohio, and have required said Association among other

things, to collect and receive from each of its members information as to the details of such member's business, and to distribute such information among all the members for their use in avoiding and preventing breaches of said agreements.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said corporate defendants, said individual defendants, and said Robert E. Belt, throughout the three years next preceding the finding and presentation of this indictment, at the place, and in the manner and form aforesaid, unlawfully have engaged in a combination in restraint of trade and commerce among the several states in malleable iron castings; against The peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

——— ———, United States Attorney.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING WRITS OF HABEAS CORPUS AND CERTIORARI—Filed Dec. 30, 1924

Be it remembered that this matter came on for hearing on the application of W. V. Hughes for a Writ of Habeas Corpus and upon the application of the District Attorney for a Warrant of Removal.

It is Ordered that the Writ of Habeas Corpus Issue and that the hearing on the said Writ and upon the application of the District Attorney be set at the first day of this Court at the Ottumwa term beginning January 20, 1925 and that the said W. V. Hughes be admitted to bail pending said proceedings in the sum of $5,000.00 to be approved by the clerk of this court.

It is further ordered that a Writ of Certiorari issue to United States Commissioner E. R. Mitchell, Ottumwa, Iowa, to certify the record of the hearing in this matter before him to this Court at Ottumwa, Iowa, on or before January 10, 1925, and that the whole matter be on January 20, 1925 submitted.

Signed this 30th day of December A. D. 1924.

(Sgd.) Martin J. Wade, Judge.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

WRIT OF CERTIORARI AND MARSHAL'S RETURN—Filed Jan. 8, 1925

To E. R. Mitchell, United States Commissioner in and for the Southern District of Iowa, Ottumwa, Iowa, Greeting:

For sufficient reasons shown by the plaintiff in the above entitled matter you are hereby commanded to certify the same to this Court, to the Clerk thereof at Ottumwa, Iowa, immediately and before the

10th day of January, A. D. 1924, your proceedings in the matter of the removal of W. V. Hughes, with all things touching the same as fully and as entirely as it remains with you by whatsoever names the parties may be called, in said proceedings together with this Writ, that the said Court may cause to be done what of right ought to be done in the premises. Dated this December 30th, A. D. 1924.

Witness Martin J. Wade, Judge District Court of the United States in and for Southern District of Iowa.

(Sgd.) N. F. Reed, Clerk.

Dated December 30, 1924.

[fols. 28 & 29] Marshal's Returns

Ottumwa, Iowa, January 2, 1925.

Served on E. R. Mitchell by leaving copy of same with his secretary.

Roy B. Gault, U. S. Marshal, by (Sgd.) B. E. Jones, Deputy.

[File endorsement omitted.]

[fol. 30] **Commissioner's Return to Writ of Certiorari**—Filed Jan. 10, 1925

In United States District Court for the Northern District of Ohio, Eastern Division

Before E. R. Mitchell, United States Commissioner, in the District Court of the United States for the Southern District of Iowa, Ottumwa Division

Indictment No. 8015

United States of America

vs.

National Malleable & Steel Castings Company et al.

Appearances of Counsel

Frank F. Wilson, Asst. U. S. Dist. Atty., for the Government.

B. M. Price, of Butler, Lamb, Foster & Pope; Jo R. Jaques, of Jaques, Tisdale & Jaques; W. G. Ross, for the Defendant.

Arthur M. Bartlett, Certified Shorthand Reporter.

[fol. 31] 10:30 o'clock a. m. December 20, 1924.

This matter came on for hearing before E. R. Mitchell, Commissioner, for the District Court of the United States, Southern District of Iowa, Ottumwa Division, at the Federal Building in Ottumwa,

Iowa. The Government appeared by Frank F. Wilson, Assistant District Attorney. The defendant appeared in person and by his Counsel, Benjamin M. Price, of Butler, Lamb, Foster & Pope; Jaques, Tisdale & Jaques, and W. G. Ross.

Government's Evidence

Argument of Counsel

Mr. Wilson: Now, Mr. Commissioner, it is my understanding that the defendant herein is willing to admit that Exhibit G-1, as marked by the reporter, is a true and certified copy of the indictment as return in this case in the United States of America vs. National Malleable & Steel Castings Company, et al., returned in the District Court of the United States, for the Northern District of Ohio, Eastern Division.

Mr. Jaques: Yes, that is correct. We concede that.

Mr. Wilson: And the Government now offers in evidence herein Exhibit G-1.

Mr. Jaques: No objection.

Mr. Wilson: It is also my understanding that the defendant, W. V. Hughes, is now in court before you and that his identity as being the said W. V. Hughes who is named in the indictment filed herein is conceded and he is the said W. V. Hughes named therein.

Mr. Jaques: That concession is made by the defendant.

[fol. 32] Mr. Wilson: The Government now moves that the defendant, W. V. Hughes, be committed pending application to the Court for a warrant for his removal.

Mr. Jaques: Do I understand you to rest? That is, you have no more evidence?

Mr. Wilson: No more evidence.

Mr. Price: If the Court please, the defendant moves that this proceeding be dismissed and the defendant discharged for the reason that the Government has not shown probable cause for removal to the Northern District of Ohio.

Mr. Price: I would like to be heard on that motion.

Mr. Jaques: I presume you don't want to be heard on your motion.

Mr. Wilson: Yes, I want to be heard on this motion.

Mr. Jaques: Well, not on yours?

Mr. Wilson: No.

The Commissioner: I would like to hear you.

10:40 o'clock a. m. The motion of the defendant was argued by Counsel.

11:55 o'clock A. M. Arguments on motion completed.

The Commissioner: The Court isn't prepared at this time to make a ruling on either of the motions, the motion of the Government or

of the defendant for dismissal, until I have an opportunity to examine these authorities. And I believe that the defendant would have a right to offer evidence if this motion is finally overruled. [fol. 33] After considering the matter, if I can, we can fix another time for the introduction of that testimony if the motion is overruled.

Mr. Jaques: We have two witnesses, Your Honor, from a distance that we would like to use and take their testimony. Without waiving our right to insist on this motion we would like to take their evidence today so that they might not be compelled to return. All the rest of our witnesses are either residents of Fairfield or Ottumwa, so far as we know, and any date that would be suitable to the Government and Your Honor would be satisfactory to us for the further hearing of this case, if it is had. But I suggest that we take the evidence of these two witnesses this afternoon.

The Commissioner: We can do that.

Mr. Wilson: All the evidence defendant has to offer may be put in.

Mr. Jaques: We couldn't get through hardly Mr. Wilson. But I would like to take their evidence subject to the ruling on the motion.

The Commissioner: I am perfectly willing to take the testimony this afternoon subject to the ruling on the motion.

Mr. Jaques: All right. What time will we convene then?

The Commissioner: 1:30. It is 12:00 o'clock now.

Mr. Wilson: That is satisfactory.

12:00 o'clock M., December 20, 1924, Court adjourned to 1:30 o'clock P. M.

[fol. 34] 1:30 o'clock p. m., December 20, 1924.

Court convened and the hearing resumed.

Mr. Jaques: Is the Court going to rule on the motions now?

The Commissioner: I am not prepared to rule on the motions, but the evidence will be taken subject to the ruling as I understand it.

Mr. Jaques: Subject to the ruling of the Court on the motion made by defendant to dismiss the proceedings and the ruling of the Court on the motion made by the Government, the defendant, for the purpose of accommodating witnesses present from a distance, at this time offers evidence in this case on his behalf.

Mr. Wilson: The Government at this time objects to the introduction of any evidence which does not go to rebut probable cause as established by the prima facia case of the Government by the introduction of the indictment herein.

The Commissioner: The evidence will be taken subject to the objection of the attorney for the Government.

[fol. 35] Defendant's Evidence

JASPER BLACKBURN, being first duly called as a witness on behalf of the defendant, was sworn by the Commissioner and testified as as follows, to-wit:

Direct examination.

By Mr. Jaques:

Q. Your name is Jasper Blackburn?
A. Yes, sir.
Q. How old are you Mr. Blackburn?
A. 55.
Q. And where is your residence? Where do you live?
A. St Louis County, Webster Grove.
Q. That is in Missouri?
A. Yes, sir.
Q. What is your connection with the Everstick Anchor Company, of St. Louis, Missouri?
A. I am President and General Manager.
Q. How long have you been President and General Manager of this concern?
A. Since its incorporation in 1906 I believe.
Q. And you are yet its President?
A. Yes, sir.
Q. In the manufacturing or assembling of your product do you use malleable iron castings?
A. Yes, sir.
Q. And unless I indicate otherwise, Mr. Blackburn, I am confining my inquiries to a period of three years before March 27, [fol. 36] 1924. Were you using malleable castings in your product during that period?
A. Yes, sir.
Q. Of whom have you purchased the larger part at least of your castings, malleable iron castings, during that time?
A. The Iowa Malleable Iron Company, of Fairfield, Iowa.
Q. Do you know personally whether or not there are malleable iron factories in St. Louis, Missouri?
A. I do. I know there is one in the City of St. Louis and there are two in East St. Louis.
Q. What are the names of those concerns?
A. Well now I don't know. I can tell you the St. Louis Malleable Casting Company is the one in St. Louis, and I don't know that I can tell you—the one in East St. Louis is the National Malleable Iron Company, and I don't know the correct name of the other one, used to be the Durbin. I don't know what the name of it is now.
Q. During this period of time inquired about have you had solicitation, verbal or in writing, from other manufacturers of malleable castings for your work?
A. Yes, sir.

Q. Can you now name any of the concerns who have solicitated you for your work during that time, whether they be residents of your locality or elsewhere?

A. Yes. The Terre Haute Malleable Casting Company, of Terre Haute, Indiana, and the Wagner Company, of Decatur; St. Louis Malleable Casting Company of St. Louis; and this concern that I do not just know the name, but I know Mr. Durbin was connected [fol. 37] with it. It was the Durbin Casting Company, Malleable Casting Company. And then I have been solicited by companies in Racine and Milwaukee.

Mr. Wilson: The Government moves that the testimony just given be stricken for the reason it is not a matter in rebuttal of probable cause, but a matter in defense to the main action.

The Commissioner: The evidence may stand subject to the objection. I will not rule on the objections at this time.

Q. Do you have charge *the*—of the purchase of malleable iron castings or does the purchase of such castings come within your control or under your control and direction?

A. It does.

Q. You say part of this solicitation was verbal and part by correspondence?

A. Yes, it has been both ways.

Q. Have you attempted, since learning that you were to be a witness here, to find some of the correspondence in the last three years from concerns other than the Iowa Malleable Iron Company, of Fairfield, soliciting business from you?

A. Yes, sir.

Q. Have you been able to find all of the correspondence that you or your concern received during that time?

A. Well, I don't think we found it all. I don't know what is missing, but——

Q. Have you found some letters that you received?

A. Yes, sir.

[fol. 38] Q. I will show you Exhibit D-1, being a letter dated June 13, 1923, from the Dalton Foundries, of Warsaw, Indiana, and ask you whether or not you received that letter in regard to soliciting trade?

Mr. Wilson: Now the Government objects to this question and all further questions along this line for the reason that it is very apparent that the reason for which the question is put and the following questions will be is to show that there was no agreement to allocate territory as between the various defendants in this case, and that testimony along this line is purely testimony in defense and is not testimony which seeks in any way to rebut probable cause under this indictment, and testimony along this line, in defense of any main action, is not triable in this court and is not admissible in the action herein.

The Commissioner: The evidence will be taken subject to the objection.

The objection was argued by Counsel

The Commissioner: I think the question is whether there is probable cause to believe the defendant is connected with the offense or charge, if there is one charged.

Mr. Jaques: That is what we are offering this for on the question or probable cause.

The Commissioner: It will be taken subject to the objection.

Mr. Wilson: Well, if the Commissioner is going to allow introduction of evidence of this kind I now move that this hearing be adjourned to some future time, until the Government can be pre-
[fol. 39] pared to introduce evidence in rebuttal of this testimony.

The Commissioner: I haven't passed on those motions yet. I understood this was just a matter of accommodation to these witnesses that are here from a distance. I am just taking this evidence subject to the motions that have already been made, and they have not been ruled on.

Mr. Wilson: Well, if this evidence is going to be admitted in support of probable cause the Government is willing to take this testimony now for the purpose of accommodating the witnesses.

The Commissioner: Well, that is what it is done for at this time.

Mr. Wilson: Before the final ruling in this case if this testimony is going to be admitted we want an opportunity to rebut it, if it should become necessary.

The Commissioner: Sure, the Government will have that opportunity.

The question was read by the reporter to the witness.

A. We did.

Q. I will show you Exhibit D-2, a letter from the Wagner Casting Company, of Decatur, Illinois, dated April 3, 1922, and ask you whether or not that is a letter that you or your concern received, soliciting trade?

Mr. Wilson: I object to the form of that question as leading, calling for the opinion and conclusion of the witness, the letter is the best evidence of what it shows.

[fol. 40] Mr. Jaques: Strike out the words "soliciting trade."

A. Yes, sir, we received this.

Q. I will show you Exhibit D-3, being a letter from the Terre Haute Malleable & Manufacturing Company, dated March 17, 1924, and ask you whether or not that is a letter which your factory received?

A. Yes, sir.

Q. I show you Exhibit D-4, being a letter from the Wisconsin Malleable Iron Company, dated September 8, 1922, and ask you whether or not that is a letter that your factory received?

A. Yes, sir, we received that.

Q. I will show you a letter dated March 15, 1922, from the Wagner Castings Company, being clipped with a carbon copy of a letter of yours in reply. I will ask you whether or not, first, Exhibit D-5 is the letter which you received from the Wagner Castings Company?

A. Yes, sir, that was received by us.

Q. And is that carbon copy attached with the clip your reply thereto?

A. Yes, sir.

Q. I show you Exhibit D-6, a letter from Heimbuecher, I guess it is, W. C., and ask you whether or not you received—your concern received that letter about its date, March 29, 1922?

A. Yes, sir.

Mr. Jaques: We offer in evidence Exhibits D-1 to D-6, inclusive, and also the carbon copy of the answer attached to Exhibit D-5.

[fol. 41] Mr. Wilson: The Government objects to the introduction of this evidence for the reason that the evidence is in defense and not in rebuttal of probable cause as shown by the indictment.

The Commissioner: It will be admitted subject to the objection.

Q. Now are you satisfied Mr. Blackburn that aside from the letters which you have produced here that you received other correspondence relative to soliciting your business during those three years?

A. Yes, from a number of other concerns; I can't just call their names now. But I remember of receiving letters, and some of them were replied to and some were not.

Q. And in addition did you receive personal calls from representatives of different factories?

A. Yes, sir.

Q. Do you say that during all of that time the Iowa Malleable Iron Company, of Fairfield, manufactured all of your malleable iron castings?

A. Yes, sir.

Q. Do you have any idea—did you have any idea or any intimation or knowledge during that time that the Iowa Malleable Iron Company, of Fairfield, had any exclusive rights to your work?

Mr. Wilson: I object to that as calling for the conclusion of the witness.

The Commissioner: Sustained.

(Exception.)

Q. Were you informed by any person during that time, any manufacturer of malleaable irons, that they could not do your work [fol. 42] on account of the fact that you were the exclusive customer of the Fairfield concern?

Mr. Wilson: I object to that question as calling for hearsay, further a conclusion.

The Commissioner: Sustained.

(Exception.)

Q. At any time when a person approached you soliciting your business was there any conversation between you and the representative of the milleable iron concern in regard to your being the exclusive customer of the Fairfield concern?

Mr. Wilson: I object to that question as calling for the conclusion of the witness, no showing of it being a conversation between this defendant, charged herein, and this witness, or the connection of the person with whom the conversation was supposed to have been had with the Iowa Malleable Iron Company.

The Commissioner: I don't believe it would be material to this hearing anyway.

(Exception.)

Mr. Wilson: It is not shown that this conversation, whoever it may have been had with, has any binding effect of any kind upon this Company.

Mr. Jaques: It has a bearing on the question of the alloting of customers.

Mr. Wilson: If you will definitely locate who this person was, perhaps it might be admissible, but I don't see how it is in the present form of the question.

Q. Well, did any representative of any malleable iron factory ever inform you that you were allotted to the Fairfield concern and that they were your exclusive—that you were to them exclusively [fol. 43] for your work?

Mr. Wilson: The same objections heretofore made, no showing who this person was and what his relation to the Company is or was at the time. He says representative. We don't know whether he is a fireman of the boiler or president of the Company.

Mr. Jaques: I mean a representative who was there soliciting trade.

Q. I mean a representative who was there soliciting your trade.

A. Shall I answer that?

Mr. Jaques: Wait a minute. The Court hasn't ruled on it yet.

The Commissioner: Why, the objection will be sustained. I don't believe that that—that is immaterial unless it is some of these parties here, charged here, or some of these concerns that are charged, Mr. Jaques, in connection with this thing. All of the malleable iron factories in the United States or the makers of castings might not be charged in this——

Mr. Jaques: They are not, Your Honor. That is a fact.

(Exception.)

Q. Did you ever talk with any representative of the Wisconsin Malleable Iron Company, from whom you have produced Exhibit D-4, in regard to your work?

A. I think not.

Q. Do you know whether there is any other malleable iron company at Decatur, Illinois, besides the Wagner Castings Company? Is there also a Decatur Malleable Iron Company there?

[fol. 44] Mr. Wilson: I object to that as leading. Let the witness testify.

The Court: Sustained.

(Exception.)

Q. Do you know?
A. No, I do not know.

The Commissioner: Just a minute.

Q. I will read over the list of persons included in this indictment and if I find anybody who solicited your work——

The Commissioner: Persons or companies Mr. Jaques?

Q. Companies.—I will name the companies who are named and if they solicited your work during that period of time I wish you would stop me right there.
A. All right.
Q National Malleable & Steel Castings Company, Cleveland and Toledo, Ohio; Chicago and East St. Louis, Illinois, and Indianapolis, Indiana. Did they solicit you for your work?
A. Yes. I can't tell you what period, though, or when it was, but they did solicit the work.
Q. Well, during this period of time covered by the indictment did the persons soliciting your work in behalf of the National Malleable & Steel Castings Company, of East St. Louis, Illinois, inform you that there was any restrictions on their right to do your work?

Mr. Wilson: I object to that as calling for hearsay.
The Commissioner: Overruled as to what this party might have said. It doesn't fix the time yet.

(Exception.)

Mr. Jaques: I said within the period covered, or the three years. [fol. 45] The Commissioner: Well, I know, but Mr.——

A. Well, pardon me, Your Honor. I think it is within—I am sure it is within the time specified.
Q. Well now did the representative of that concern inform you that you were restricted in any manner to the Fairfield concern, the Iowa Malleable Iron Company?
A. No, sir.
Q. When they solicited for your work did they inform you that there was any reason why they could not do your work?
A. No. They were very anxious to do it.
Q. Did they submit to you prices, and these other concerns whose letters have been introduced, did the companies submit to you prices?
A. Not all of them.
Q. At times?
A. Well, I can't say that all of them have solicited—or quoted prices.
Q. But some of them have?
A. Yes.

Q. Do you remember whether the National Malleable & Steel Castings Company, near neighbor of yours, submitted prices?

A. They did.

Q. Have you any present recollection as to whether or not their prices were higher or lower than the Fairfield concern's the Iowa Malleable Iron Company?

A. Well, conditionally lower. That is——

Q. What do you mean by conditionally lower?

A. Well, they take certain castings and produce them at a lower price, but they wouldn't take the whole set of patterns and do it, [fol. 46] you see.

Q. They would take certain patterns and do it?

A. They would take the preferable ones, yes, the ones that produced the greater tonnage.

Q. And when they did submit to you those patterns at a lower price state whether or not—what was your reason for rejecting their proposition?

Mr. Wilson: I object to that as calling for the opinion and conclusion of the witness.

Q. If you did reject it?

The Court: Sustained.

(Exception.)

Q. Are there other elements connected with the purchase of malleable iron castings to be considered in addition to the question of price?

A. Yes, sir.

Q What mainly governs your selection of manufactures of that character?

A. Service and quality, two of the main reasons, and the fear that we may not get what we want and we know that we have been getting what we want.

Q. And——

A. And fearful, too, that they might not live up to their agreement, when we know that the present concern does.

Q. Is there also some difference in manufacturers of castings of that character, in regard to taking back defective or claimed defective castings and replacing them?

A. Well, there is that rear, yes, but I don't know—I don't know that they wouldn't do it, though.

[fol. 47] Q. No. But you do know what the practice of the Fairfield concern has been?

A. Yes, sir.

Q. So the question—is the question of price then conclusive in determining where you shall buy castings or do these other elements govern even where you can get a lower price occasionally?

A. Why, the other elements has its influence, yes.

Q. Now has the National Malleable Castings Company, of Cleveland and Toledo, Ohio, Chicago and East St. Louis, Illinois, and Indianapolis, Indiana, solicited you for your work during that time?

A. Yes, sir. That is, I assume this is all one company, that is.

Q. Well, one is the National Malleable & Steel Castings Comapny and the other is the National——

A. What I mean is that one of this company—this combination you are naming——

Q. But one of those two?

A. Yes.

Q. The other is the National Malleable Castings Company.

A. Of East St. Louis?

Q. Yes.

A. Yes. Well, that company did personally.

Q. Has the Eastern Malleable Iron Company, also trading as Bridgeport Malleable Iron Works, Naugatuck Malleable Iron Works, [fol. 48] Troy Malleable Iron Works, Wilmington Malleable Iron Works, and Vulcan Iron Works, ever solicit you during that period for your business?

A. Not to my recollection, no.

Q. Has the Dayton Malleable Iron Company solicited you for your work during that time?

A. My mind is not clear on that. I think they have, but I wouldn't say positive.

Q. Has the Albany Malleable Iron Company, of New York, Albany, New York, solicited you during that time?

A. I think not.

Q. The Albion Malleable Iron Company, of Albion, Michigan, has it solicited you?

A. I think not.

Q. The American Malleable Castings Company, of Marion, Ohio, has it solicited you?

A. I can't recall it.

Q. Has the Badger Malleable & Manufacturing Company, of South Milwaukee, Wisconsin, solicited you for your work during that time?

A. They have, and I won't say during that time. They have solicited us, but whether it is within this period I wouldn't say.

Q. What is your best recollection as to whether it was within that period?

A. I think it was. I think it was. But I wouldn't say definitely.

Q. Do you know whether or not they—that solicitation was verbal or by correspondence?

[fol. 49] A. By correspondence.

Q. Have you that correspondence now?

A. Not to my knowledge.

Q. Have you any recollection as to the prices quoted by them, whether they were higher or lower than the Fairfield concern?

A. I do not know.

Q. Do you remember what reason, if any, you gave for not giving them the work?

A. I do not know that I made any reason.

Q. Has the Belle City Malleable Iron Company, of Racine, Wisconsin, solicited you during that time for your work?

A. I don't recall that.

Q. Has the Chicago Steel Castings Company, formerly named Chicago Malleable Castings Company, of West Pullman, Chicago, Illinois, solicited you for your work?

A. I don't remember of them having done it within this period.

Q. Has the Columbus Malleable Iron Company, of Columbus, Ohio, solicited you for your work during that time?

A. I do not remember that.

Q. Has the Danville Malleable Iron Company, of Danville, Illinois, solicited you for your work during that period?

A. Yes, sir.

Q. Was that verbal solicitation or in writing?

A. In writing.

Q. Did you give them any of your work during that time?

A. I did not.

[fol. 50] Q. Do you have any recollection as to whether or not the prices quoted were more or less than the prices quoted by the Iowa Malleable Iron Company?

A. I don't remember the price quotation at all.

Q. Has the Decatur Malleable Iron Company, of Decatur, Illinois, solicited you for your work during that time?

A. I do not remember.

Q. Has the Thomas Devlin Manufacturing Company, of New Jersey, office perhaps in Philadelphia, solicited you for your work during that time?

A. I think not.

Q. Has the Erie Malleable Iron Company, of Erie, Pennsylvania, solicited you for your work during that time?

A. No, sir.

Q. Has the Federal Malleable Company, of West Allis, Wisconsin, solicited you for your work during that time?

A. I don't think so.

Q. Has the Fort Pitt Malleable & Grey Iron Company, of Pittsburgh, solicited you during that time?

A. I think not.

Q. Has the Frazer & Jones Company, of Syracuse, New York, solicited you during that time?

A. I think not.

Q. Or the Illinois Malleable Iron Company, of Chicago, has it solicited you during that time?

A. I am not sure about that. I think so, but I am not sure.

Q. Did you give them any of your work?

[fol. 51] A. No, sir.

Q. Has the Kalamazoo Malleable Iron Company, of Kalamazoo, Michigan, solicited you for your work during that time?

A. Not in that period, no, sir.

Q. Has the Kennedy Corporation, also trading as Baltimore Malleable Iron & Steel Castings Company, of Baltimore, solicited you during that time?

A. I think not.

Q. Has the Laconia Car Company, of Laconia, New Hampshire, solicited you during that time?

A. No, sir.

Q. Has the Lakeside Malleable Castings Company, of Racine, Wisconsin, solicited you during that time?

A. No, I don't think so, during that time. We have had correspondence with them, but——

Q. You think it was before that time?

A. I think so. I am not sure about that, however.

Q. Has the Lancaster Foundry Company, of Lancaster, Pennsylvania, solicited you during that time?

A. No, sir.

Q. The Marion Malleable Iron Works, of Marion, Indiana, has it solicited you during that time?

A. There was a Marion solicited us, but I don't know whether it was a malleable or steel casting company, or whether they do both.

Q. Some concern in Marion solicited you?

A. Yes.

Q. But you are not able to say that is the concern?

[fol. 52] A. No, sir.

Q. Has the Meeker Foundry Company, of Newark, New Jersey, solicited you during that time for your business?

A. No, sir.

Q. Has the Moline Malleable Iron Company, of St. Charles, Illinois, during that time solicited you for your business?

A. No, sir.

Q. The Northern Malleable Iron Company, of St. Paul, Minnesota, has it solicited you during that time for your business?

A. No, sir.

Q. The Northwestern Malleable Iron Company, of Milwaukee, has it during that time solicited you?

A. I think not.

Q. The Pittsburgh Malleable Iron Company, of Pittsburgh, Pennsylvania?

A. No, sir.

Q. The Rhode Island Malleable Iron Works, of Hillsgrove, Rhode Island?

A. No, sir.

Q. The Rockford Malleable Iron Works, of Rockford, Illinois?

A. No, sir.

Q. The Ross-Meehan Foundries, of Chattanooga, Tennessee?

A. No, sir.

Q. The St. Louis Malleable Casting Company, of St. Louis, Missouri?

A. Yes, sir.

[fol. 53] Q. Was that personal solicitation or——

A. Personal, yes, sir.

Q. And how frequently during these three years has this St. Louis Malleable Casting Company, your direct neighbor, solicited you for your work?

A. Oh, some four or five times.

Q. Have they quoted prices to you of castings during that time?

A. Yes, sir.

Q. Have you any present recollection as to whether or not their quotations were higher or lower than you were paying the Iowa Malleable Iron Company?

A. Well, in some respects they were a little lower.

Q. Did you give them any of your work?

A. I did not.

Q. Did they or anybody representing them claim to you that you were allotted to the Fairfield concern at the time?

A. They did not.

Q. Or make any such a statement to you?

A. No, sir.

Q. Or any of these other concerns that made quotations to you?

A. No, sir.

Q. Has the Standard Wheel Company, also trading as Standard Malleable Catsings Company, of Terre Haute, Indiana, solicited you for your work during that time?

A. Well now there was a Terre Haute company, but that is another company. That is the Terre Haute Malleable Company. [fol. 54] There is only the one that I recall.

Q. You think this is not the company?

A. I don't remember but the one.

Q. There is only one on this list.

Mr. Price: Well, the other is a member, but not indicted.

Mr. Wilson: There is no showing that the other one is a member.

Q. Has the Stanley G. Flagg & Company, of Philadelphia, solicited you for your business during that time?

A. No, sir.

Q. Or the Stowell Company, of South Milwaukee, Wisconsin?

A. I don't recall them.

Q. The Springfield Malleable Iron Company, of Springfield, Ohio?

A. No, sir.

Q. The Temple Malleable Iron & Steel Company, of Temple, Pennsylvania?

A. No, sir.

Q. The Trenton Malleable Iron Company, of Trenton, New Jersey?

A. No, sir.

Q. The Vermilion Malleable Iron Company, of Hoopeston, Illinois?

A. I don't remember of that concern, no, sir.

Q. The Wanner Malleable Castings Company, of Hammond, Indiana?

A. No, sir, I don't remember them.

[fol. 55] Q. The Wisconsin Malleable Iron Company, of Milwaukee, Wisconsin?

A. I don't remember them.
Q. The Zanesville Malleable Company, of Zanesville, Ohio?
A. We have had letters from them, yes.
Q. Soliciting business?
A. Yes, sir.
Q. During that period?
A. Yes, sir.
Q. Did you give them any business?
A. No, sir.
Q. Did they quote prices?
A. I don't recall that they did.
Q. Has the Union Malleable Iron Company, of East Moline, Illinois, solicited any of your business during that time?
A. I think not.
Q. Or the Warren Tool & Forge Company, of Warren, Ohio?
A. No, sir.
Q. You have named at least three of these concerns that are indicted here who have by personal solicitation and by correspondence solicited you for your business during this period. At any time when these parties solicited you for your business did any question arise as to the right of the Iowa Malleable Iron Company, of Fairfield, to hold you as their exclusive customer?
A. No.
Q. Was anything said on that subject by you or by the persons soliciting you for your business?
A. No. That phase was not mentioned.
[fol. 56] Q. Did you ever understand that you were to deal with the Iowa Malleable Iron Company, of Fairfield, as its customer?
A. No, sir. I wouldn't stand for that kind of business.
Q. And when you refused to award contracts to these other concerns, even though their prices were lower than the prices being charged by the Iowa Malleable Iron Company, state whether or not the reasons that you have heretofore given were the controlling reasons for refusing them your business.

Mr. Wilson: I object to that question as leading, argumentative, and calling for the opinion and conclusion of the witness.

The Commissioner: Sustained.

(Exception.)

Q. When you refused to give to these other persons your work state whether or not you had any idea or information that you were compelled to deal alone with the Fairfield concern, the Iowa Malleable Iron Company.
A. Well, let's see. I want to get that question. I didn't get it good.

The question was read to the witness by the reporter.

A. I had not.
Q. Was there any other reason for refusing these other concerns who quoted lower prices at times your work than the fact that the

service and the quality of the work of the Fairfield concern was satisfactory to you?

A. Coupled with personal knowledge of their output and the manner in which they handled our business, yes.

Q. My attention has been called to the fact that you had no [fol. 57] recollection of being solicited by the Wisconsin Malleable Iron Company during this period. I call your attention to Exhibit D-4, being a letter dated September 8, 1922, from the Wisconsin Malleable Iron Company, and ask you whether or not that refreshes your recollection that you were, in fact, solicited during that time by that concern?

A. Yes, I sure was. This proves it. But I couldn't recall the——

Q. You can't recall all these?

A. From memory, no. There are numerous ones that I can't recall. We get letters nearly every week from somebody, but I don't remember. I don't pay enough attention to them that they impress me.

Mr. Jaques: That is all. You may cross examine.

Cross-examination.

By Mr. Wilson:

Q. Mr. Blackburn, do you make malleable castings yourself?

A. No, sir.

Q. Have you ever been in that business?

A. No, sir.

Q. Your business is the making of products from the castings? Is that right?

A. Yes, sir.

Q. You have no way of knowing about how these malleable casting companies run their business, personal knowledge of any kind?

A. Well, I don't know what you mean by how they run their [fol. 58] business.

Q. Do you know whether they have had any communications between each other as to prices or anything of that kind?

A. Why, no, I do not.

Q. Do you know whether or not if it is a claim that this territory is allot-ed to one or more persons, or three persons, or four persons, or four companies, as you have testified here having received applications for orders from,—you don't know whether this is all in the same territory or not do you?

A. I know nothing about such arrangements, no, sir, if there be such.

Q. Do you hold any stock in the Fairfield Company here?

A. I do not.

Q. Do you hold any stock in any malleable iron company?

A. I do not.

Q. And are you a member of the Board of Directors or connected in any way with any malleable iron company in the United States?

A. No, sir.

Q. You don't know whether these members or the companies as read to you from the indictment here by Mr. Jaques are in the same territory or not, do you, if there was an allocation of territory made?

A. No, I know nothing about any arrangement whatsoever.

Mr. Wilson: That is all.

Mr. Wilson: Now the Government moves that this evidence all be stricken for the reason that the witness has shown himself in-
[fol. 59] competent to testify as to whether or not there was any allocation of territory, that the evidence is in defense of the charge herein and not in rebuttal of probable cause, and for the further reason it is incompetent, immaterial and irrelevant.

The Commissioner: It may stand subject to the objection.

Redirect examination.

By Mr. Jaques:

Q. There is one matter I neglected to ask about Mr. Blackburn. Have you any knowledge of the tonnage or the amount of malleable iron castings purchased by you from the Iowa Malleable Iron Company during the years 1921, 1922 and 1923 following March 27, 1921?

A. I presume or feel that it would run around 650 or 700 tons a year.

Q. Might have been a little larger than that in 1922 and 1923?

A. Well, yes. I don't—I didn't get any figures from our books. I am just giving you that, as you might say a guess,—not wholly a guess either, but——

Q. You mean that many tons of castings?

A. Yes, sir.

Q. You spoke about sometimes receiving lower prices on part of the product consumed by you. State whether or not, however, averaging their prices on all products with the prices quoted to you by other concerns of similar character you found their prices to be
[fol. 60] about on an average equal to the other prices quoted.

A. You are referring to the Iowa Malleable?

Q. Yes, sir.

A. Yes, sir.

Q. Did you ever find their prices to be excessive in comparison with quotations from these other concerns?

A. No, sir. In most cases they were lower.

Q. The Iowa concern was lower?

A. Yes, sir.

Q. With your knowledge of the prices of materials and the price of material elsewhere, etc., entering into the price of manufacturing castings, state whether or not the prices that you pay to the Iowa Company you consider to be reasonable prices for the character and the quality of the work that you have been getting.

Mr. Wilson: I object to that question as calling for the opinion and conclusion of the witness, of an expert; he is not properly quali-

fied; he has already testified that he never manufactured castings or never was connected with any company which did.

Mr. Jaques: He is a purchaser, however, and keeps up on the market prices.

Mr. Wilson: He has already testified that the Iowa Malleable prices were lower than the other, he don't know what it costs to produce castings, and he never manufactured them.

The Commissioner: Sustained.

(Exception.)

Q. Did you keep yourself informed of the condition of the market as to cost of pig iron and the cost of other materials entering into [fol. 61] these malleable iron castings?

A. We kept posted fairly well as to the pig iron prices because we get a journal giving it every week; but other materials, such as coal and oil and sand and stuff, I do not keep up on. I do know what malleables are worth——

Mr. Wilson: Now I object to that as not responsive.

Q. Will you say that you were acquainted during these years with the fair market price of castings of the character that you were purchasing?

A. Well, I know what other firms asked for similar castings.

Q. Well, that is one way of finding out the market price.

A. Yes, sir.

Q. Would you say from what you knew of other firms asking for the same kind of castings and your general knowledge of market conditions and labor conditions that you were acquainted during that time with the fair market value of the castings of the character that you bought of the Iowa Company?

A. Yes, sir, I think I am competent——

Q. What would you say as to whether or not the prices charged by the Iowa Malleable Iron Company during this period of time were fair and reasonable prices for their product?

Mr. Wilson: That is objected to for the same reasons heretofore given.

The Commissioner: Overruled.

(Exception.)

A. The prices were lower than most any of the other foundries.

Q. Yes. That don't exactly answer the question. What would [fol. 62] you say as to whether or not their prices were fair and reasonable for the product?

A. I think they were.

Mr. Jaques: That is all Mr. Blackburn.

Recross-examination.

By Mr. Wilson:

Q. Now the reason you gave the Iowa Malleable Iron Works your business, one of the main reasons, was because their prices were lower is it?

A. Yes, sir.

Mr. Wilson: That is all.

A. Price and quality.

Q. The price was lower wasn't it than the others? You said that didn't you?

A. In some instances I have been quoted a lower price, than the Iowa Malleable, certain periods.

Q. By any member that is charged in this indictment? Can you testify to that?

A. Well, the National Company, of East St. Louis. They are a member are they not?

Mr. Jaques: Yes.

A. Well, that is one of them. The St. Louis Malleable Casting Company. Are they a member?

Mr. Price: Yes, sir.

A. They have quoted us lower prices, yes.

Q. Lower than the Iowa Company?

A. Yes, sir.

[fol. 63] Q. And when was that?

A. Well, they did so in October——

Q. 1924?

A. Yes, sir. And they did——

Q. This year.

A. Yes, sir.

Q. That is since the return of the indictmet ain't it in this case?

A. I don't know when the indictment was returned.

Q. Well now prior to March 27, 1924, will you say that is true, that they quoted lower prices than the Iowa Company?

A. Yes, sir, last year they did.

Q. And when was it?

A. Well, last year, the latter part of last year.

Q. What date, around what date?

A. Well, the activities of the malleable casting companies are somewhat prior to the first of the year because they know that our agreement with them, with the Iowa Malleable——

Q. Well, what is the date that they quoted a less price?

A. I can't tell you the date, only it was prior to the first.

Q. Well, was it December, 1923?

A. Yes, sir. I won't say that it was November or December.

Q. November or December, 1923?

A. Yes, sir.

Q. Now what was the difference between their price and the price of this Fairfield Company?

[fol. 64] A. Well, I have quoted—or stated that some of the certain—castings from some of the certain patterns were lower, while they wouldn't take the whole tonnage.

Q. No, they wouldn't take your whole order.

A. No, sir.

Q. But they did give in a few instances a slightly different price?

A. Yes, sir.

Q. But on the whole thing the prices weren't substantially different were they?

A. Well, I just told you I can't tell you that because they didn't give us on the whole thing.

Q. As a matter of fact, you don't remember much about these prices do you?

A. Why, I certainly do, yes, sir.

Q. Well then what do you remember? What was the difference in these prices?

A. Well, there is about 25¢ a hundred.

Q. On what?

A. On the castings that they wanted to make, that the Iowa Malleable people were making.

Q. How many different kinds of castings do you recall?

A. Well now I can't tell you that without figuring up.

Q. Well, figure up. You have figured this other up very easily.

A. All right. Give me a little time and I will figure it up for you. We have about between forty and fifty different castings.

[fol. 65] Q. Well, say fifty?

A. Yes, sir.

Q. Now on how many of those different castings were the prices of the East St. Louis companies less than the Iowa Company?

A. About fifteen, but that was the greater part of the tonnage.

Q. There were fifteen. There are thirty-five that were higher or the same?

A. Well, a little higher.

Q. A little higher.

A. That they didn't quote on at all.

Q. What is it?

A. That they didn't want to make, yes.

Q. Didn't want to make.

A. No, sir.

Q. And you wouldn't give your order to anybody that wouldn't make your entire contract, would you?

A. Well, if it was to my advantage I would, yes.

Q. You never did, did you?

A. Why yes. The St. Louis Malleable Iron Company used to make our castings, and the Missouri Malleable Iron Company used to make our castings.

Q. Well, different times of the year one company would make all of them?

A. Well, part of the time the St. Louis Malleable Castings made part of them and the Missouri Malleable Iron Company made part of them.

[fol. 66] Q. Well, since you have been doing business with this Iowa Malleable Company who has been making them?

A. The Iowa Malleable Iron Company.

Q. Been making them all?

A. Yes, sir.

Q. Although some of the prices on their castings are higher than the prices quoted by the St. Louis concerns?

A. Yes, sir.

Mr. Wilson: That is all.

Redirect examination.

By Mr. Jaques:

Q. The prices quoted by these St. Louis concerns now, were they F. O. B. St. Louis?

A. Yes.

Q. And the prices quoted by the Iowa concern, were they F. O. B. St. Louis or Fairfield?

A. Fairfield.

Q. So that in addition to the difference in price would there be a saving in freight rates also if you had dealt with your nearby manufacturer?

A. Yes, there would be a saving in the freight.

Q. When you say that these concerns bid on certain patterns and did not bid on others state what the fact is as to whether or not they usually bid on patterns of large tonnage.

A. That was the case, yes. The patterns they bid on was probably eighty per cent of our production.

Q. And the smaller patterns, the patterns of small tonnage, they wouldn't bid on?

[fol. 67] A. No, they didn't want to make them.

Q. I see. The price is regulated by the tonnage, is it not, the weight?

A. Why, yes.

Q. Net weight, or——

A. Sure, quantity production is the way they figure tonnage.

Mr. Jaques: That is all.

Mr. Wilson: Now the Government renews the objections heretofore made to the testimony and moves that it be stricken for the reasons heretofore given.

The Commissioner: Same ruling.

Witness excused.

[fol. 68] J. A. Scott, being first duly called as a witness on behalf of the defendant, was sworn by the Commissioner and testified as follows, to wit:

Direct examination:

By Mr. Jaques:

Q. What is your name, Mr. Scott, your initials, or your first name?

A. Joseph A.

Q. Where do you live?

A. Monmouth, Illinois.

Q. What is your business?

A. Secretary and General Manager of Brown, Lynch & Scott Company.

Q. What is the general nature of the business of that concern?

A. Manufacturers of implements and mill order merchants.

Q. By implements you mean agricultural implements?

A. Agricultural implements, yes, sir.

Q. How long have you been connected with the—with either that concern or its predecessor?

A. Since the fall of 1908.

Q. During the last three years prior to March 27, 1924, what did you have to do with the purchase of supplies, such as malleable iron castings?

A. It came entirely under my supervision.

Q. And did you state in the record here what your position was; Secretary do I understand?

A. Yes, sir, Secretary and General Manager.

[fol. 69] Q. During that time state whether or not you have purchased any malleable iron castings of the Iowa Malleable Iron Company.

A. We have.

Q. To what extent have you purchased your castings of this concern, whether you purchased all or only part of your castings?

A. We purchased all.

Q. Of this concern?

A. Yes, sir.

Q. During that time have you been solicited either personally or by correspondence by other manufacturers of malleable iron castings for your work?

A. Yes, sir, we have.

Q. Have you any correspondence here aside from the letter that is dated in 1924, after the time of the finding of this indictment—have you any correspondence here with you from any of these concerns soliciting your business?

A. We have not. We don't keep our correspondence more than six months, and we have no——

Q. Do you destroy your correspondence regularly at the end of six months?

A. Yes, sir.

Q. And therefore you are unable to produce any written solicitations? Is that the reason why?

A. That is, yes, sir.

Q. You say every six——

Mr. Wilson I don't want to object to these questions all the time, [fol. 70] but I wish Mr. Jaques would let the witness testify.

Q. Well, have you any correspondence antedating six months back with any concern?

A. No, sir, I have not.

Q. Have you during those three years covered by the indictment had personal solicitation from members of this association?

A. I have no knowledge of the association. We have had solicitation from the Peoria Malleable Iron Company and from the Vermilion Malleable Iron Company, Peoria——

Q. Of Hoopeston, Illinois?

A. Peoria Malleable Iron Company, of Peoria, and the Vermilion Malleable Iron Company, of Hoopeston, Illinois.

Q. Any other concern whose name has been read off by me here from this indictment that you had personal solicitation from during those three years?

A. I am not sure that it is within the three years. We have had solicitation from the Stowell Company at South Milwaukee. I wouldn't say whether it was during the three years for sure.

Q. What is your best recollection or best impression about the matter?

A. My best impression is that it was about three or four years ago.

Q. Now?

A. Now.

Q. Can you remember any other concern whose name has been [fol. 71] read off of this indictment besides the Vermilion Malleable Iron Company and the Peoria Malleable Iron Company and the Stowell Company which either by correspondence or verbal solicitation sought your business during that time?

A. I am not sure. My recollection—my impression is that we have had numerous other solicitations, but I am not sure.

Q. How far would Hoopeston, Illinois, be from your factory, or is it?

A. Approximately two hundred miles.

Q. Is it closed or farther than Fairfield, Iowa?

A. Farther.

Q. And I presume the Stowell Company, at South Milwaukee, is farther away.

A. About two hundred and fifty.

Q. Farther away than Fairfield or closer?

A. Farther.

Q. And the Peoria—Peoria is closer than Fairfield?

A. Closer, yes, sir.

Q. Now during that time did these different concerns quote you prices on your product—or your needs?

A. Part of them did. I couldn't say now that all did. I don't recall.

Q. Part of them at least did. Have you any present recollection as to whether or not their prices were higher or lower than the prices you were paying for the product of the Iowa Malleable Iron Company?

A. Part of their prices were lower.

Q. Did you have any knowledge at an y time before you came [fol. 72] here as a witness that there was an association of the malleable iron manufacturers in the United States?

A. None whatever.

Q. Did you ever have any knowledge that you or your concern was alloted or restricted to the Iowa concern as a customer?

A. No, sir.

Q. In all your dealings with these persons who were soliciting your business did you ever receive any information that they could or could not fill your necessities, needs, on account of the fact that you were allotted to some other concern?

A. Well, from the fact that I was urgently solicited I assumed that they wanted the business.

Q. You received no intimation—or did you receive any intimation that you were restricted to dealing with the Iowa concern?

A. None at all, no, sir.

Q. What was the reason Mr. Scott that you did not give business to these competing concerns when their prices were lower than the Iowa concern's?

Mr. Wilson: That is objected to as calling for the opinion and conclusion of the witness, not calling for facts.

Mr. Jaques: To meet the view that he didn't know he was restricted, didn't have any idea that he was restricted.

The objection was argued by Counsel.

The Commissioner: The evidence will be received subject to the objection.

Q. Answer the question. What was your reason?

A. There is considerable expense in the moving of patterns from [fol. 73] one foundry to another, and our service was excellent; we didn't figure that—in our judgment the difference in price wasn't—didn't justify moving. The Iowa Malleable Company had given us excellent service, excellent quality of material, for a good many years. We were satisfied to stay with them.

Q. Were you, from your knowledge of your trade and of general trade conditions, including the cost of pig iron, materials and labor, general labor conditions, and of prices quoted to you from other concerns, were you during this period of time familiar with the fair market price of castings such as you were buying?

A. I thought I was.

Q. What will you say as to whether or not the price charged during this period of time by the Iowa Malleable Iron Company was, in your judgment, a fair and reasonable price for the product?

A. I always felt that it was. I might say that one of the ways of determining that, I frequently made inquiry from other implement manufacturers as to what they were paying for malleable and always found that our——

Mr. Wilson: I object to this as hearsay. He has already testified of the fair market value.

Mr. Jaques: Well, this is another thing I overlooked.

Mr. Wilson: Seems to be very keen to help you.

Q. In addition to the matters that I have inquired about then state whether or not you had knowledge of the fair market value [fol. 74] of similar castings from other concerns, such as——

A. I frequently made inqtiiry from other implement manufacturers as to what they were paying and found that our price averaged well. I was perfectly satisfied.

Mr. Jaques: Cross-examine.

Cross-examination.

By Mr. Wilson:

Q. You say you didn't know anything about the existence of an association amongst malleable iron manufacturers?

A. I did not.

Q. Would you have been so well satisfied with your price if you knew there had been an association that fixed the prices for these various castings?

Mr. Jaques: I object to that as assuming a matter that is not in evidence.

Mr. Wilson: Well, he seemed to be very keen about being satisfied with prices here and I want to show that he would not have been so keenly satisfied if he had known all the circumstances.

The Commissioner: Overruled.

(Exception.)

A. Does that mean that I shall answer the question?

Q. Yes.

A. No, I don't think I would have been satisfied if I had known that a combination—that a price was arbitrarily fixed.

Q. The fact was that you were so well satisfied of the—with the price that you didn't know about it, wasn't it?

[fol. 75] A. Well, I think if there had been—if our price had been out of line at all I would have known it or found it out among quite a number of other manufacturers.

Q. Now that is not answering my question.

Mr. Wilson: I move that the answer be stricken as not responsive.

The Commissioner: It may go out. (Exception.)

Q. Answer the question.

Mr. Wilson: Will you please read the question Mr. Reporter?
The question was read to the witness by the reporter.

A. Well, I said I was satisfied, and I was.
Q. You don't manufacture castings?
A. No, sir.

Mr. Wilson: That is all.
Mr. Jaques: That is all Mr. Scott.
Mr. Wilson: The Government moves to strike this evidence for the reasons heretofore given.
The Commissioner: The same ruling. All of this evidence is taken subject to the objections of the Government.

Witness excused.

COLLOQUY BETWEEN COMMISSION AND COUNSEL

Mr. Jaques: Now we are through with these witnesses from a distance. Now we are ready to proceed with the other witnesses that we have if you want us to, subject to the same objections, or we would like to go ahead and finish it if we can, but, of course, we can't probably finish it all by this evening and Mr. Wilson suggests that he wants it postponed.
[fol. 76] Mr. Wilson: Well, I would like to have a ruling on those——

The Commissioner: Mr. Wilson has said that if this evidence is finally admitted after a consideration of these motions that have been made the Government wants a chance to introduce some rebuttal.
Mr. Jaques: Well, that part is all right, but whether he wants to go ahead now with whatever evidence we have——
Mr. Wilson: Yes.
The Commissioner: We might as well go ahead and take what we have, yes.
Mr. Wilson: Yes, might as well go ahead the rest of the afternoon.

W. V. HUGHES, being first duly called as a witness in his own behalf as a defendant, was sworn by the Commissioner and testified as follows, to wit:

Direct examination.

By Mr. Price:

Q. What is your name?
A. W. V. Hughes.
Q. What is your age Mr. Hughes?
A. 43.
Q. And where do you live?

A. Fairfield, Iowa.

Q. You are named as one of the defendants in this case?

[fol. 77] A. Yes, sir.

Q. In this indictment?

A. Yes, sir.

Q. What is your connection with the Iowa Malleable Iron Company?

A. I am Secretary and General Manager.

Q. How long have you been connected with the Iowa Malleable Iron Company?

A. About twenty years.

Q. What positions have you held with the Iowa Malleable during those—during that period?

A. Bookkeeper, Order Clerk, Assistant Secretary, Secretary, and Secretary and General Manager.

Q. And how long have you been Secretary and General Manager, Secretary-Treasurer and General Manager?

A. I have been General Manager and Treasurer since the middle of the summer of 1917, and I have been Secretary since 1915.

Q. You have charge of the business of your Company, the details and business of your Company?

A. Not all details. My work is somewhat executive in character.

Q. Will you state just what your duties are with the Company? Confining your answer to the three years immediately preceding March 27, 1924, and the three-year period charged in the indictment.

A. Well, I have been the General Manager of the institution, in executive charge of all departments of operation and all branches of [fol. 78] the institution, so far as that is concerned.

Q. Do you solicit business?

A. Yes, sir.

Q. Who in your Company does most of the soliciting of business?

A. Well, I probably do, myself.

Q. You may state what products the Iowa Malleable Iron Company manufactures.

A. As to the classification of the work that we make?

Q. No. In the first place, what is your product?

A. Malleable iron castings only.

Q. Along what particular lines? How is it classified?

A. We specialize on light and medium weight work, such as agricultural implement castings.

Q. What proportion of your tonnage, roughly, during the period in question comprises agricultural implement castings?

A. Probably right around fifteen per cent.

Q. And what other classes does your Company make?

A. Make miscellaneous castings. Make automobile accessory work, some railroad.

Q. What percentage approximately of miscellaneous castings does your Company produce?

A. During the last three years?

Q. Yes.

A. That probably runs up pretty close to fifty per cent.

Q. Does that include automobile castings?
A. No.
Q. What percentage of automobile castings does your Company [fol. 79] produce?
A. A very small percentage. I wouldn't say over five or six per cent. It might run a little in excess of that.
Q. And what percentage does your railroad tonnage comprise, roughly?
A. It runs up around thirty some per cent, including the street car work.
Q. Will you describe how malleable castings are made, the nature of the process?

Mr. Wilson: I object to that question as immaterial, irrelevant and incompetent to any issue that there might be in this case.
The Commissioner: Sustained.

(Exception.)

Mr. Wilson: Immaterial.
Mr. Jaques: Your Honor, it is with this thought, that the price of articles of this kind is not governed by the same rules as is the price on wheat or steel rails or things of that character, but they are necessarily individually priced.
The Commissioner: The same price—the same process is used by all malleable iron casting factories, isn't it?
Mr. Price: There might be shown a difference in different factories.
Mr. Jaques: I doubt it, because of the cost of labor.
Mr. Wilson: It seems to me that is very clearly evidence in defense and can't be evidence rebutting the prima facia case of the Government, and doesn't bear on probable cause under this indictment.
[fol. 80] The Commissioner: It doesn't look to me that this is material.

(Exception.)

Mr. Price: This is rebuttal of probable cause.

The objection was then argued by Counsel.

The Commissioner: The other witnesses that you expect to use are local and can be gotten easily?
Mr. Jaques: Yes.
The Commissioner: Well, why not, as Mr. Wilson suggests, adjourn this hearing until the 29th at ten o'clock and by that time I will make my decision on these motions, either to commit or discharge?
Mr. Jaques: Well, I think myself that the Court ought to pass on the motion—the question that is involved here, but I think that we ought to have a ruling on this question of the admissibility of the evidence at the earliest possible period because if the Court refuses

to hear our evidence we are satisfied we can take the matter up on a writ of habeas corpus.

The Commissioner: Well, my thought is that this objection is now before the Commissioner and in passing on these other motions I will determine what I will do in that.

Mr. Wilson: I object to the evidence now as introduced and that which is being sought to be introduced as being evidence in defense of this defendant and not evidence in rebuttal of probable cause as shown in the indictment.

Mr. Jaques: Well, I think, Your Honor, in this situation if you will let us know in advance of the 29th of your ruling we can at least save a lot of time here and know where we are at.

[fol. 81] The Commissioner: Well, that is my thought.

All parties agreed that the hearing would be postponed at this point to be again taken up at 1:30 o'clock P. M., December 29, 1924.

[fol. 82] 1:30 o'clock p. m., December 29, 1924.

The hearing of this case was resumed.

Mr. Jaques, of Counsel for Defendant, was unable to be present on account of sickness of himself.

The Commissioner handed the Reporter his Opinion on motions made and directed that it be made a part of the record. In full, it is as follows, to-wit:

[Title omitted]

OPINION ON MOTIONS TO STRIKE AND TO DISMISS

This matter comes before me for hearing upon a complaint for removal of the defendant, W. V. Hughes, who, with other defendants, has been indicted by the Grand Jury in the District Court of the United States of America, for the Northern District of Ohio, Eastern Division, on a charge of violation of the Sherman Anti Trust Act.

There is no well defined rule of procedure in the hearing of such matters, but Sections 1014 and 1029 Revised Statutes of the United [fol. 83] States provide that such hearings shall conform to the practice prescribed by the Statutes of the State wherein the arrest is made.

Under the Statute in Iowa covering Fugitives from Justice the hearing contemplated is for the purpose of determining:

(1) The identity of the Prisoner.

(2) Whether the venue of the crime charged was properly laid within the demanding jurisdiction.

(3) If the indictment on its face fairly charges a violation thereby of the Criminal Statutes of such State, it would be sufficient warrant to find that the defendant is a Fugitive from Justice.

Harris vs. McGee, 150 Iowa, 144-147. Chapter 624, Code of Iowa 1924, Sections 13503-13504.

Under the foregoing propositions for determination as applying in a hearing of this character,

(1) The identity of the defendant has been conceded and that he is an officer of the defendant corporation, Iowa Malleable Iron Company, incorporated under the laws of Iowa and located at Fairfield, Iowa.

(2) As to the second proposition "whether the venue of the crime charged was properly within the demanding jurisdiction."

The crime charged is a violation of the Sherman Anti Trust Act, and while the indictment may not be drawn with that clearness as to specify the acts of individual defendants constituting the offense, as might be done by some in the drawing of indictments, yet I believe the indictment clearly charges an offense against the Govern-[fol. 84] ment, and that the indictment or venue of the charge is properly laid in the Northern District of Ohio, Eastern Division.

(3) If the indictment on its face fairly charges a violation of the Statutes, the other proposition having been determined in the affirmative, then the Commissioner would be justified in finding the defendant to be a fugitive from justice.

I have thoroughly examined the authorities cited by both Counsel for the Government and for the Defendant.

In Collins vs. Loisel, 259 U. S., 309, at 315, the Court said:

"Such reasonable ground to suppose him guilty as to make it proper that he should be tried. Evidence only as to ambiguities or doubtful elements in the prima facts case made against him. The evidence excluded related strictly to the defense. The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial and not to determine whether the evidence is sufficient to justify a conspiracy."

In Price vs. Henkle, 216 U. S., 488, at 493, the Court said:

"Conspiracy may have been formed in the District of Columbia without appellant being physically present when the conspiracy was formed."

From the foregoing it is my conclusion that there is no reason or justice in the demand by Counsel for Defendant that they have a right to present their defense and compel the Government to enter into a full trial of the issues in a hearing of this character.

As stated by the Court in Charleton vs. Kelly, supra, "Evidence in defense not permitted before Grand Jury except by its consent."

[fol. 85] The question of probable cause goes to the point as t whether or not there has been an offense against the Government an whether there are reasonable grounds to believe the defendant t have been a party to it and not on the question of his guilt or in nocence under said charge, that to be determined by trial in th Court having jurisdiction.

In the light of the foregoing, it is my opinion that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible and the motion to strike such evidence as has already been heard, of a defensive nature, made by Counsel for the Government is sustained.

The Motion to commit or bail for appearance for trial by Counsel for the Government and Motion to dismiss are not herein ruled on pending such further proceeding or evidence offered at time to which this cause has been continued.

Dated 12/24/1924.

Ernest R. Mitchell, U. S. Commissioner."

To all of which Exception was taken.

Mr. Price, Counsel for Defendant, then asked the Commissioner if he would hear further argument on the questions referred to by the Commissioner, and was given permission to present the matter further.

1:50 o'clock P. M. Mr. Hughes was recalled and the taking of evidence resumed.

[fol. 86] W. V. HUGHES, being recalled, resumed the witness stand and testified further as follows, to-wit:

Direct examination.

By Mr. Price:

Q. Mr. Hughes, how long have you been a resident of Fairfield, Iowa?

A. About twenty years.

Q. Were you in the Northern District of Ohio in the month of March, 1924?

A. No, sir.

Q. Have you been in Fairfield and in Jefferson County, Iowa, since March 27, 1924?

A. Yes, sir.

Q. And your whereabouts have been known to people generally and you have made no attempt to conceal yourself in that time?

A. No, sir, I have not.

Q. Mr. Hughes, will you state where your customers are located with respect to how far east they are located and how far west, etc.?

A. We have customers as far west as Pittsburgh, Pennsylvania——

Q. East?

A. East I mean. As far east as Pittsburgh, Pennsylvania, as far north as Milwaukee and Minneapolis, as far west as Seattle, Spokane and Los Angeles, and the extreme southern point is Dallas, Texas.

Q. Mr. Hughes, how have you determined what prices to charge [fol. 87] your customers?

Mr. Wilson: I object to that as calling for the conclusion of the witness.

The Commissioner: Overruled. He has testified that he is manager and secretary of the Iowa Malleable Iron Company. I suppose that is the company you refer to, how they fix their prices.

Mr. Price: Yes.

(Exception.)

A. Our sale prices have been based upon our actual cost of accounting records and based according to our actual experience of the cost of producing our work, or if it is new work on the cost established on that work after the submission of proper information regarding the character of the work and the condition of the pattern equipment and tonnage involved, and then our prices are made or established on what we consider as our legitimate margin of profit, which is added to the either actual or market conditions, the cost affecting that particular work.

Q. Do you have written contracts with your customers?

A. The last written contracts that we had expired in 1919, or possibly the early part of 1920.

Q. And what is your practice now with regard to filling orders from your customers?

A. With very few exceptions every price or agreement that we have with a customer is subject to change at any time in accordance with the—any change in the actual or market cost conditions. There are some few customers who insist on quarterly definite statement of price.

[fol. 88] Q. Has any individual or corporation or association ever suggested to you or your company that your price in a given instance should be raised?

A. No, sir, they have not.

Q. Have those persons referred to, persons and corporations, ever requested you in any way to refrain from lowering any price for malleable iron castings?

A. You mean any—any person or corporation?

Q. Yes.

A. No, sir.

Q. Or association?

A. No, sir, I never had it suggested.

Q. Or any member of any association?

A. No, sir.

Q. I show you defendant's exhibit number 7 and ask you whether or not that is a list of the customers of the Iowa Malleable Iron Company?

Mr. Wilson: I object to that as not being the best evidence, no having been shown where that came from or anything about it.

The Commissioner: Sustained.

(Exception.)

Mr. Price: I will qualify the witness.

Q. Who prepared the statement referred to?
A. This statement here you mean (indicating D-7)?
Q. Yes.
A. I did.

Mr. Price: Is there any objection to it?
Mr. Wilson: Well, there is yet certainly.
[fol. 89] Mr. Price: What is your objection?
Mr. Wilson: Why, he hasn't shown where he took it from or ho he got it or what his direction was or anything else.

Mr. Wilson: Do you carry in your head the customers of you company Mr. Hughes?
A. A complete list of them?
Mr. Wilson: Yes.
A. Not definite.
Mr. Wilson: So that you can write that down out of your head?
A. No, sir.
Q. From what did you make up this list of customers?
A. This list was made up from our records. I didn't make th list myself; I had it made, in fact.
Q. Under your supervision?
A. Yes, sir.
Q. Where is the Alexander Manufacturing Company located?
A. At Ames, Iowa.
Q. And when did you obtain that company as a customer?
A. As near as I can recollect along about 1915 or 1916.
Q. State whether or not you are still supplying that compan with malleable iron castings.
A. Yes, sir, we are.
Q. What do you make for them?
A. They make garden implements and garden tools and the cas ings go for the manufacture of that class of implement.
Q. Will you state how you obtained the Alexander Manufacturin Company as a customer?
[fol. 90] A. Mr. Alexander——

Mr. Wilson: I object to this question for the reason that it doesn appear how it can be in rebuttal of probable cause and for the reaso it is in defense and not in rebuttal of probable cause.

Mr. Price: Well, if Your Honor please, we will make an offer what the defense intends to prove, to simplify matters.

Mr. Wilson: All right, go ahead.

Mr. Price: For the purpose of showing want of probable cause f believing the defendant, W. V. Hughes, guilty of the offense charge

in the complaint and indictment, the defendant offers to prove by the testimony of himself and other competent witnesses that during the period covered by the indictment, to-wit: from January 1, 1917, to March 27, 1924, the date of the finding of said indictment, neither the defendant nor the Iowa Malleable Iron Company, with which he is affiliated, has ever entered into any understanding, agreement or combination with any person or corporation named in the indictment to eliminate competition as to prices, terms and conditions of sale or as to customers, nor carried on trade or business in malleable iron castings under or pursuant to any such agreement or understanding, nor fixed nor quoted excessive or non-competitive prices; but on the contrary have based prices charged for castings upon the costs of producing those castings plus a fair margin of profit and the only agreements ever made regarding prices charged for said castings were with the respective customers; that during said period [fol. 91] the defendant and the said company have not unlawfully engaged in a combination in restraint of interstate trade and commerce in malleable iron castings and have never fixed excessive and non-competitive prices for said castings, nor quoted prices, nor made sales of said castings at prices so fixed, and have never assigned or allotted customers to be held as the exclusive customers of any person or corporation, nor enforced such assignments by refraining, directly or indirectly, from competing for customers so assigned; that during the said period no individual, corporation or association has ever requested the defendant or the said company to raise or maintain prices of malleable iron castings or to refrain from quoting any customer or consumer of malleable iron castings; and that defendant has never asked any individual or corporation to raise or maintain prices of castings or to refrain from quoting any customer or consumer of castings; that during the said period the said company has supplied malleable iron castings to customers located as far east as Pittsburgh, Pa., as far south as Dallas, Texas, as far north as Minneapolis, Minnesota, and as far west as Seattle, Washington, and Los Angeles, California, and neither the said company nor the defendant has ever considered nor in any way been advised that its territory was restricted or its customers allotted in any way whatsoever; that the said company joined the American Malleable Castings Association for the sole purpose of obtaining the benefit of the co-operative research work which the association proposed and has since carried on for the improvement of the quality of malleable iron castings and the methods of producing said castings; and that neither the de- [fol. 92] fendant nor any officers of said company have ever held any office or position with said association or taken part in directing any activities of said association; that during said period the said company has acquired all of its customers in the ordinary course of competitive trade, that such customers as it has retained during said period it has retained by means of fair prices and satisfactory service and not by any agreement or understanding with any person or corporation or association as to prices or terms or conditions of sale except the agreement between the particular customer and said com-

pany, and that such customers as it has lost have been lost in the ordinary course of competitive trade and have not been assigned or allotted by said company or by the defendant or by any other person, corporation or association.

The Commissioner: Part of that might be admissible Mr. Price. I don't feel, under my reading of the authorities, that you are entitled to go into what might strictly be construed as defensive matters, but I think that some of that that is included in your offer there might be admissible.

Mr. Price: Well, if Your Honor please, I see no other way to prove that the customers were acquired in the ordinary course of competitive trade than to take up the customers one by one and have the witness show how he acquired the customer and how he kept them or how he lost them, as the case may be.

The Commissioner: I don't really believe that that would be conclusive or binding on the Commissioner on this question, though, even at that. That would be largely a question for a jury. It is [fol. 93] a question of evidence.

Mr. Price: Of course the Government would have the opportunity both to cross examine and to bring in evidence in rebuttal, but that is the procedure that has been followed elsewhere over the objection of the Government.

Mr. Wilson: Where has it been followed Mr. Price?

Mr. Price: At Chattanooga and Chicago.

The matter was further argued.

Mr. Price: If Your Honor thinks that this offer is not objectionable I will go ahead.

The Commissioner: Well, I do think that parts of it are objectionable and are matters that go directly to defense.

All of which was duly excepted to.

Q. When did the Iowa Malleable Iron Company join the American Malleable Castings Association?

A. It was—either in 1914 or 15; I am not positive.

Q. Do you know at whose suggestion your Company joined that Association?

A. I made a suggestion to Mr. Spaulding, who was then Manager of the Company.

Q. And were you at that time an officer of the Company?

A. I was, yes.

Q. What was the object in joining this Association?

A. To get the benefit of the research and laboratory experience and the program of technical work that the Association were putting on then and contemplated carrying on to a greater degree in the future years. We were producing at that time a very inferior [fol. 94] product.

Q. Is that true of the malleable iron industry generally or were you speaking of your own Company?

A. I was talking about our own concern.

Q. Well, do you know about the condition of the malleable iron

castings produced by other companies as well as your own, speaking very generally?

A. Very generally only. I know that there was a great deal of difference in different companies as to the quality of the product; sometimes you would get good material and other times you would not.

Q. Were your Company and other malleable companies experiencing any competition from other castings—from manufacturers of other than malleable iron castings at that time?

A. Yes, sir. We have always experienced that competition.

Q. From what sort of manufacturers?

A. Well, manufacturers of gray iron, or semi-steel, or steel.

Q. And state what was done by the Association at that time along the line of this research work? State as briefly as possible.

A. I know at the time we joined the Association of the specifications for physical requirements of samples, as set down by the American Society for Testing Materials, and that was 35,000 pounds tensile strength per square inch with an elongation of five per cent in two inches. At the present time those specifications are 50,000 [fol. 95] pounds tensile strength per square inch with a ten per cent elongation in two inches, which very nearly approaches certain classes of steel castings in strength.

Q. During that time did the Association maintain laboratories and its own chemist?

A. Yes, sir.

Q. Whereabouts?

A. At Albany, New York.

Q. And what was each member of the Association required to do or to send to that laboratory?

A. We were required to send to the consulting engineer of the Association some one test bar from some one heat each day, each working day; that is, a standard test bar of the American Society for Testing Materials.

Q. State whether or not your Company did that during the period from January 1, 1917, to March 27, 1924, the date of the indictment.

A. I don't remember exactly when they started that system of sending in bars, but we have ever since it has been in existence.

Q. Who is the chemist who has been employed by the American Malleable Castings Association?

A. Enrique Touceda.

Q. Spell it.

A. E-n-r-i-q-u-e T-o-u-c-e-d-a.

Q. State whether or not he and his assistants have any system for inspecting plants of members of the Association.

A. Yes, sir, they do.

[fol. 96] Q. What system have they?

A. Well, they have these test bars and the requirements are that the—that at least ninety per cent of all your bars must stand up physically under the requirements of the Association each three months or you are not considered a producer of first class malleable iron; and, furthermore, there is an inspector at the present time, for

instance, comes around at our plant every three weeks and inspects our product to see if the castings that we are producing conform with the quality of material and the physical requirements of the test bars that we submit to the Association engineer. He makes a report, a copy of which goes to the consulting engineer for—of the Association, and a copy of which I get, with such comments as he cares to make on his findings. And he also picks up at random any castings that he sees fit or any other test bars which are also tested for a check against our work.

Q. What is given to a member whose tests—whose test bars meet the tests of this Association, what certificate or——

A. A certificate as to quality, stating that they come within the requirements of the Association and are considered a producer of what they term certified malleable iron castings.

Q. What, if any, other activities, co-operative research activities, are carried on by the Association, in respect, for example, to shop practice, shop safety?

A. They carry on very exhaustive research work with reference to even molding sands and different classes of fire brick and packing materials, the construction of annealing ovens, the operation and construction of the melting furnaces. We so happen to have in our [fol. 97] own plant, our own metallurgist is a member of the shop practice committee of the Association of fifteen that handle all these questions. He is on the committee of annealing.

Q. Have you a laboratory of your own at your plant?

A. Yes, sir.

Q. How long have you maintained that laboratory?

A. Since 1920.

Q. Did your experience with the research work of the Association have any bearing upon your starting your own laboratory?

A. Yes, sir, it did.

Q. What?

A. We found out we couldn't make the uniform product without more technical metallurgical and chemical knowledge as to the character of the materials and class of material that we wanted to turn out. We couldn't even keep up with the requirements of the Association without more technical knowledge. And we sent a man to school for nine months, at our own expense, to become a metallurgical engineer.

Q. Did you have any other object in joining the Malleable Castings Association, other than you have indicated just now?

A. That was our sole object, was to get the benefit of the co-operative research work.

Q. Have you ever been an officer of the American Malleable Castings Association?

A. No, sir, I have not.

Q. Or held any position with the Association?

[fol. 98] A. Not other than a member.

Q. Have you attended meetings of the Association?

A. I attend the meetings in Chicago when they are held there quite regularly.

Q. Was the matter of prices, or terms, or conditions of sale, or allocation of customers ever discussed at any meeting of the Association which you attended?

A. No, sir, never was.

Q. Did you ever discuss such matters with members of the Association?

A. I might in a casual conversation regarding market conditions in different parts of the country.

Q. Did you ever discuss with members the allocation or assignment of customers generally, or any particular customer?

A. No, sir, I never did.

Q. Did you ever discuss with any officer of the Association or any member of the Association the matter of fixing prices?

A. No, sir, except at the instigation of the War Industries Board.

Q. Well, tell about that.

Mr. Wilson: What was that answer?

A. At the instigation of the War Industries Board, in 1918.

Mr. Wilson: I object to that, six years before the finding of this indictment, being immaterial to any issue here.

The Commissioner: Sustained.

(Exception.)

Q. When you attended these meetings of the Association state [fol. 99] whether or not you made efforts to find out market conditions.

A. Regarding—regarding what, do you mean?

Q. Market conditions in your industry.

A. Yes.

Q. Did you do that aside from any conversations with members of the Association?

A. If I wanted any information regarding—probably concerning market conditions as to various classes of castings, any casual conversation of that kind would be held a an individual.

Q. But you stated that you attended these meetings in Chicago as I understand it.

A. Yes, sir.

Q. And when you made those trips to Chicago did you make independent inquiries of producers of raw materials as to prices of raw materials, such as pig iron and coke?

A. Yes, sir.

Q. Have you sent out to consumers of malleable products any advertising letters or circular letters?

A. Nothing more than——

Q. Soliciting their trade?

A. Nothing except personal letters.

Q. State whether or not you have—that has been a practice of the Iowa Malleable Castings Company to solicit trade generally in that manner.

A. Yes, sir, we have.

Q. Have you done it during the three years ending March 27, [fol. 100] 1924?

A. Yes, sir.

Q. Well, state how frequently you have sent out such letters.

Mr. Wilson: I object to that as immaterial and not rebuttal of probable cause.

The Court: Well, he may answer.

(Exception.)

A. What was the question?

The question was read by the reporter.

A. That depends on business conditions. But we usually send out inquiries of that kind, soliciting work from the users of malleable when the business conditions are at a low ebb.

Q. Did you communicate with the Association or with any member of the Association before sending out such letters as to whether it was proper for you to send out letters to the given consumers?

A. No, sir. I consider it my right to solicit business where I please.

Q. Where did you get the list to which you addressed such letters?

A. From our records that we have kept up for a great many years as to the users of malleable.

Q. How many years?

A. Oh, ten or twelve years at least; twenty years possibly.

Q. Has any member of the Association or any individual representing a member of the Association or the Association ever request [fol. 101] you not to solicit the trade of a given consumer of malleable iron?

A. No, sir.

Q. Of malleable iron castings?

A. No, sir.

Q. Have you ever requested any individual or any corporation to refrain from soliciting one of your customers?

A. No, sir, I never did.

Q. When you received an inquiry from a consumer of malleable iron castings state just what you did before you quoted him, what information you generally obtained.

Mr. Wilson: I object to that question as—and all other questions along this line as being immaterial, irrelevant and incompetent, being evidence purely in defense and not in rebuttal of probable cause, and inadmissible for that reason and for each and all the reasons stated.

The Commissioner: I think that would be defensive matter. Objection sustained.

(Exception.)

Q Mr. Hughes, have you at times declined to quote when you have received inquiries from customers—from consumers of malleable iron castings?

Mr. Wilson: The same objections heretofore made.

The Commissioner: I don't see where that is material. Objection sustained.

(Exception.)

Q. State whether or not you have supplied castings to the American Car Company.

A. Yes, sir, we have.

Mr. Wilson: I object to that for the reasons heretofore made, [fol. 102] immaterial, not in rebuttal of probable cause.

The Commissioner: I think all that evidence would be strictly defensive. Te objection will be sustained to that.

(Exception.)

Recess.

Q. Mr. Hughes, during the period covered by the indictment, from January 1, 1917, to March 27, 1924, have you or the Iowa Malleable Iron Company over entered into any understanding, agreement or combination with any person or corporation named in the indictment to eliminate competition as to prices, terms and conditions of sale, or as to customers?

A. No, sir.

Q. Have you or your Company carried on trade or business in malleable iron castings under or pursuant to any such agreement or understanding?

A. No, sir.

Q. Have you or your Company fixed or quoted excessive or non-competitive prices?

A. No, sir.

Q. Have you or your Company during said period engaged in any combination in restraint of interstate trade and commerce in malleable iron castings?

A. No, sir.

Q. Or fixed excessive and non-competitive prices for malleable iron castings or quoted prices or made sales of such castings at prices so fixed?

A. No, sir.

[fol. 103] Q. Have you or your Company ever assigned or allotted customers to be held as the exclusive customers of any person or corporation?

Mr. Wilson: I object to that question for the reason it is in defense and not in rebuttal of probable cause and move that all previous testimony along this line that has been had since the recess be so stricken for this same reason, incompetent, irrelevant and immaterial.

The Commissioner: The evidence may stand as to his having any agreement or working under any agreement.

(Exception.)

The question was read by the reporter.

A. No, sir.

Q. Or enforced such assignments by refraining, directly or indirectly, from competing for customers so assigned?

A. There are no assignments.

Q. With regard to the list of customers, defendant's Exhibit D-7, containing about 178 customers, will you state whether you acquired all of those customers in the ordinary course of competitive trade?

A. We did.

Mr. Wilson: The same objections as heretofore.

The Commissioner: Overruled.

(Exception.)

Q. State whether or not as to such of those customers as your Company has retained during the period covered by the indictment, whether it has retained those customers by means of any agreement or understanding with any other person or corporation or associa-
[fol. 104] tion as to prices or terms or conditions of sale or allotment of customers.

A. No, sir, they have not been retained by any agreement, or in any way aside from the actual business transactions with those customers themselves.

Q. If you know how did you retain those customers during that period?

A. By reason of fair business dealing and fair prices and fair consideration, and the quality of the material and the personal service granted to those customers.

Q. What elements enter into the service rendered by a manufacturer of malleable iron castings?

Mr. Wilson: I object to that as immaterial.

The Commissioner: Sustained.

(Exception.)

Mr. Price: If your Honor please, we desire to show that the price of malleable iron castings is not alone important, but just as important as the matter of price is the matter of service, and particularly the quality of the castings; that it is not like a standard product, such as lumber, or steel rails, but each casting differs from every other casting.

The Commissioner: I think that would be immaterial under the charge in the indictment. Objection sustained.

(Exception.)

Q. Will you state whether any customers that you may have lost in the period covered by the indictment were assigned to any other manufacturer, allotted or assigned?

A. I never had any such knowledge.

Q. How do you account for their leaving you?

A. On account of directly competitive conditions.

[fol. 105] Q. What enters into those competitive conditions?

A. The matter of price, the matter of delivery, the matter of quality possibly for a certain class of work.

Q. I show you a certain list of companies, marked Exhibit D-8, and ask you whether that was prepared by you or under your direction?

A. It was prepared under my direction from our records.

Mr. Price: Defendant offers Exhibits D-7 and D-8 in evidence.

Mr. Wilson: We object to them for the reason they are in defense and not in rebuttal of probable cause; because of the fact that they are not the best evidence, not properly identified; they are evidence in themselves and contain conclusions and opinions.

Mr. Price: The defendant offers to show that the corporations or companies named in the defendant's Exhibit D-8 were, under the first heading, obtained since 1918, and under—that those under the second heading were lost since 1919.

The Court: The objection will be sustained.

(Exception.)

Mr. Ross: Does the Court sustain it on the ground of incompetence?

The Commissioner: Well, I don't see that it is material to the issue here, and it is irrelevant.

Mr. Ross: Well, it probably isn't competent under our rule. We can supply the competency by Mr. Hughes' own personal knowl-

[fol. 106] edge, and I would like to have the record so show. Of course that memorandum there probably isn't competent now.

The Commissioner: Well, I am satisfied so far as Mr. Hughes is concerned, of his personal knowledge, so far as that is concerned.

Mr. Ross: But I would like to have the record show that it isn't sustained on the ground of incompetence.

The Commissioner: Well, it is sustained on the ground that it is purely defensive matter and doesn't rebut the question of probable cause.

All of which was duly excepted to.

Q. This list, however, does not show all the customers obtained since 1919 or lost since 1919?

A. No, sir.

Q. But only the important customers?

A. The more or less important customers, yes, sir.

Mr. Price: Do I understand that Your Honor has stricken from the record the testimony of the two witnesses, Mr. Blackburn and

Mr. Scott? In view of that ruling, to which an exception was entered I believe, I don't see any use in producing witnesses, customer witnesses, other customers. If Your Honor would consider readmitting that testimony and hearing further evidence from customers I can show facts which I think would certainly have a bearing on this question of probable cause.

The Commissioner: The way I look at it, as I have stated before, if the customer didn't know that he was held as a customer of a certain organization because of some agreement that the manager [fol. 107] of that plant had entered into, and if there was such an agreement and by reason of that fact he wasn't buying as cheaply as he could, his testimony that he didn't know those facts to exist wouldn't amount to a great deal.

Mr. Price: Isn't it very material to know that they did not have any knowledge or any inkling of a suspicion that they had been assigned or allotted—in fact, that they state that they were not assigned or allotted, so far as they know, and that certainly goes to rebut this charge of allotting and assigning customers.

The matter was further argued.

The Commissioner: I think that would be purely defensive matter and not in rebuttal of probable cause.

Mr. Price: Well, if Your Honor so rules, that is about all we can do.

(Exception.)

Mr. Price: That is all Mr. Hughes.

Cross-examination.

By Mr. Wilson:

Q. I would like to ask you one or two questions Mr. Hughes. When was it Mr. Hughes that you joined the American Malleable Castings Association?

A. I think it was in 1914 or 15. I am not positive though, of that date.

Q. And you have maintained your connection with them up until the present time?

A. Yes, sir.

Q. Is that organization still in existence?

[fol. 108] A. Yes, sir, so far as I know.

Q. How much per year did you pay to that organization?

A. I couldn't tell you. It is based somewhat on tonnage and—to the research department.

Q. Tonnage in the research department?

A. Based somewhat on the tonnage that we produce and our research work.

Q. I don't understand you, what you mean.

A. Well, if we make 3,000 tons a year our dues for the research are a certain figure. They would be different if it was 2,000 pounds.

Q. How much per ton?

A. I think it is—I am not definite about that. I don't know for sure.

Q. Well, you are Treasurer. You pay the bills of this Company.

A. Yes, sir.

Q. How much did you send a ton?

A. I think it was 25¢ a ton.

Q. 25¢ a ton. How much has your Company produced per year in the last few years?

A In 1923—I am speaking about our fiscal periods.

Q. What is your fiscal period?

A. What is that?

Q. What is your fiscal year?

A. At the end of June 30.

Q. Well say now from June 30, 1922, to June 30, 1923, what was your tonnage?

[fol. 109] A. In the neighborhood of 3,000 tons.

Q. 3,000 tons. What was it from June 30, 1923, to June 30, 1924?

A. About 3,300 or 3,400.

Q. So from June 30, 1922, to June 30, 1923, you sent the American Malleable Castings Association $750.00. Is that right?

A. I don't know the definite amount.

Q. Well, if you produced 3,000 tons during that period you sent them $750.00 didn't you, 25¢ a ton?

A. I think the assessments for the research work are based on the calendar year.

Q. Well, all right. Let's get then from June 1st—or January 1, 1923, to January 1, 1924, how much iron did you produce in that time?

A. I couldn't give you the figures for that.

Q. Well, it would be practically the same as you would produce in your fiscal year wouldn't it?

A. Not necessarily.

Q. Well, would it vary much?

A. It would depend upon the—upon the conditions of the business.

Q. Well, from January 1, 1923, to January 1, 1924, approximately what was your tonnage produced by your Company?

A. I will just have to guess at that as our records are not kept in that manner.

Q. Mr. Hughes, you testified that from June 30, 1922, to June 30, 1923, you produced 3,000 tons; from June 30, 1923, to June 30, 1924, you produced 3,300 tons.

[fol. 110] A. Yes, sir.

Q. So wouldn't you have produced from January 1, 1923, to January 1, 1924, at least 3,000 tons?

A. We probably did.

Q. And if you did you would have sent that company $750.00 wouldn't you?

A. If that was the case, yes, sir.

Q. Well, how much did you send them?
A. I couldn't state.
Q. Do you draw the checks for your Company?
A. I sign the checks.
Q. How did you send this money in?
A. By check.
Q. By the month or by the year?
A. By the year.
Q. Don't you recall the check you signed the 1st of last January to this American Malleable Castings Association?
A. No, sir, I do not.
Q. Your mind has been pretty clear on all the rest of this business. Can't you recall how much that was approximately?
A. No, sir, I can't. I sign a good many checks in the course of a year.
Q. Now all the connection you had with the American Malleable Castings Association was with this metallurgical research department. Is that right?
A. No. We were a member of the Association.
Q. Well, but that is all you subscribed to was the metallurgical research department?
[fol. 111] A. No. We paid dues to the——
Q. Well, what other connection did you have with the Association?
A. As a member——
Q. Well, what do you mean, as a member?
A. Of the organization.
Q. What do you mean, as a member?
A. Why, being a member of the organization. That is the only meaning there is to it.
Q. Well, did you have any other reason for belonging to this Association besides getting the results from its metallurgical researches?
A. And doing our share in the upbuilding of an industry of that character.
Q. How did you share in the upbuilding of it?
A. By participation in the research work.
Q. Well then your only object in connection with this Association was for its research work, metallurgical research?
A. Yes, sir, that is our sole, main reason for belonging.
Q. In producing these castings?
A. Yes, sir.
Q. Did you belong to the information service of this Association?
A. Information service?
Q. Yes. Did you get that?
A. We did if we asked for it, certain information.
[fol. 112] Q. You know they maintain an information service don't you?
A. They maintain a bureau for certain information, yes, sir.
Q. Yes, in charge of Robert R. Belt?

A. Yes, sir.

Q. Did you or did you not know that all the members of the Association did not receive that information service?

A. No, sir; I didn't know anything about that.

Q. Didn't know anything about that.

A. No, sir.

Q. And if that fact existed it wasn't within your knowledge?

A. As to part of them and not the others?

Q. Yes.

A. No, I have no knowledge of that.

Q. What information did you receive from Robert E. Belt?

A. That would be pretty hard to state in one answer. It is a pretty broad question.

Q. You have got lots of time.

A. Received information with reference to the character of work that a particular user possibly of malleable iron castings required and condition of pattern equipment——

Q. Certain customers. Now you received certain information of him of certain customers that required malleable iron castings, didn't you?

A. Yes, sir.

Q. And you were assigned—that customer was assigned to you by him wasn't he?

[fol. 113] A. No, sir.

Q. You and perhaps two or three other companies together?

A. I never heard of such a thing.

Q. Did you ever gain any customers who had been cited to you by Mr. Belt?

A. No customers were ever assigned to us by Mr. Belt.

Q. Well, who were cited to you. Leave out the word assigned. That seems to bother you.

A. I don't know whether he ever cited a customer to us——

Mr. Price: What do you mean by cited?

Mr. Wilson: Well, he said Robert E. Belt wrote to him and pointed out to him certain customers who wanted castings.

A. I said upon my inquiry.

Q. That was upon your inquiry?

A. Yes.

Q. He never sent that to you voluntarily?

A. No.

Q. You never received a weekly or a monthly volunteer statement or a pamphlet, or letters from him, or telephone or telegraph calls, in regard to this casting business did you? You didn't receive such service?

A. Casting business? I don't know what you mean.

Q. Well, about the general business. Did you ever receive any regular service from Robert E. Belt in the way of pamphlets, letters, telephone or telegraph calls?

A. I might have asked him for some information and received [fol. 114] it that way.

Q. Did you ever receive it except when you asked for it?
A. Not regarding customers.
Q. Well, regarding anything.
A. I might have regarding some meeting or something of that character.
Q. Nothing that you recall of except some meeting?
A. Not that I recall of, no, sir.
Q. Did you ever ask Mr. Belt in regard to who might be possible customers of your Company?
A. No, sir, not unless it was a direct inquiry concerning some certain concern.
Q. And what would you inquire in regard to some certain concern?
A. As to the character of the work, if another member had listed them and were making their work.
Q. Well, why did you do that?
A. To get the information as to the character of the work that that concern wanted, the condition of their pattern equipment.
Q. Why did you care whether they had been listed by any other producer of malleable iron castings?
A. I would have to get the information some place, and in a great many instances customers do not have that information themselves.

Mr. Price: If Your Honor please, I endeavored to bring out just what information Mr. Hughes endeavored to obtain before taking up the work of any consumer of malleable iron and Your Honor [fol. 115] wouldn't let me go into it. I think that this is objectionable. If Your Honor will let me go back and on my direct examination bring out these facts it will be proper for Mr. Wilson to cross examine on them after that.
The Commissioner: Well, I was letting it in on account of its connection with this Association.
Mr. Price: I would have no objection.
The Commissioner: Well, if you have anything along that line you can go into that.
Mr. Wilson: Yes, if you have any further questions along that line, of his connection with this Association, I have no objection to that either.

All of which was duly excepted to.

Mr. Price: May I resume then at this point?
The Commissioner: Yes.

Further direct examination.

By Mr. Price:

Q. What information did you endeavor to obtain before you made any work for a consumer of malleable iron castings?

Mr. Wilson: I want that connected with this Association. You say what information. Now you mean from the Association?

Mr. Price: I will come to that, but I think this is a proper question at this time.

Mr. Wilson: I object to this question as immaterial under the issues.

The Commissioner: Overruled at this time.

(Exception.)

[fol. 116] The question was read by the reporter.

A. Every casting has its own conditions and its own cost. It is utterly impossible to quote on any man's work, I don't care what he makes, unless you have absolute and accurate knowledge as to the different needs—the different things relating to that work. You must know conditions, as to his pattern equipment and the condition of it and the character of his castings.

Q. All patterns are not the same then?

A. No, indeed.

Q. Is there such a thing as a standard casting?

A. Yes, there is in certain classes of work. Railroad work, for instance, has certain standard parts.

Q. What work?

A. Railroad work.

Q. Do you do much railroad work?

A. Oh, very little.

Q. Well, in castings which you manufacture you may state whether or not there is a variety of those castings or whether they differ each from the other.

A. Each and every casting has its own cost.

Q. Well, do the patterns which you receive from the consumers differ as to quality of the patterns, some being in good condition and some in bad?

A. Yes.

Q. And are some of the castings which you manufacture intricate castings, of intricate design and difficult to manufacture?

[fol. 117] A. Yes, they are.

Q. What information along that line is it necessary for a manufacturer of castings to know before he undertakes to turn out castings for a customer?

A. It is necessary to know the condition of the pattern equipment, as I said a while ago, and the general character of that casting, in order to form your cost. One casting weighing one pound might cost one figure and another casting weighing one pound might cost ten times as much, depending on the character of that casting and the condition of the pattern equipment from which it is to be made.

Q. Did you endeavor to find out whether castings for which you received an order had been difficult for some other producer of malleable castings to manufacture?

A. Yes.

Q. And how would you find out? How would you obtain such information?

A. We might get that information from the former producer

and also if it was work of a class that we were not equipped to handle. Another reason to follow up an inquiry, it has never been our policy to take work that we didn't figure we could carry on for one particular customer as a steady customer.

Q. And could you obtain information along that line by communicating with the Association and finding out the former source of supply of a given consumer?

A. Yes, you could. You could get some information along that line. We did that in very, very few instances.

[fol. 118] Q. Well, tell just what you did in those few instances where you did get information from the Association. What did you do in the way of following that up?

A. If the work was of a character that we could handle it and it was in our line, with the pattern equipment proper, we considered it our perfect right to quote; we didn't care where that customer was located. If they were a concern that were using castings that were not in our line, or automobile work, for instance—we don't get in any automobile work except accessory work; never get in any of it; not equipped to handle it—or if they were customers so situated geographically as you might get a spasmodic order from at one time and never get them again, you can't make anything that way, from customers of that kind; you can't make money on a single order of a concern, so much preliminary cost to getting ready to produce a firm's work.

Q. State whether or not some producers of malleable iron castings specialize in light castings and others in heavy castings.

Mr. Wilson: I object to that as immaterial, incompetent and ir relevant.

A. And in which of those categories your Company is.

Mr. Wilson: The same objection.
The Commissioner: Overruled.

(Exception.)

A. There is a very decided difference in the character of work required by users of malleable castings. We make—specialize on light work.

Q. Your Company?

[fol. 119] A. Yes.

Q. If you found out that a consumer who had sent you an inquiry had just been receiving its castings from a manufacturer of castings whom you knew supplied only heavy castings would that have any bearing upon whether or not you went after that trade?

Mr. Wilson: I object to that as very leading and suggestive.
The Commissioner: Sustained.

(Exception.)

Q. Can you give some illustrative example, if any occurs to you, how by finding out the manufacture of malleable castings who had

immediately previous to the receipt of your inquiry been supplying the concern determined whether you would solicit that business?

A. I don't recall any. There are very few inquiries that we have made of that character.

Q. And state whether or not in the majority of instances you made inquiry of the American Malleable Castings Association regarding the respective consumer.

A. No, we don't in the majority of cases; not near.

Q. Well, can you approximate the percentage of cases in which you did make such inquiry of the Association?

A. I couldn't answer that in any degree of accuracy, but I wouldn't consider it over ten per cent.

Mr. Price: You may cross examine.

[fol. 120] Further cross-examination.

By Mr. Wilson:

Q. Now in regard to the money you sent this Association, was it 25¢ a ton that you testified to here as sending them—is that all the money that you ever sent them?

A. No, sir.

Q. What other money did you send them?

A. We sent our annual dues of $120.00 a year.

Q. $120.00 a year. Now the annual dues and this 25¢ a ton, did that constitute all the money you sent?

A. As far as I know, unless they were undertaking some special technical work that required extra funds to carry that work on.

Q. Did you pay anything extra for this information service?

A. No, sir.

Q. Would that come in the $120.00 a year annual dues?

A. I don't know where it came in. I didn't handle the benefits of the Association.

Q. Did you have any by-laws or anything like that in this Association?

A. Yes, sir.

Q. Was it incorporated, or just an association unincorporated?

A. I couldn't say.

Q. Did you ever read their by-laws?

A I don't believe I ever did.

Q. Does your Company have a copy of them?

[fol. 121] A. I do not know whether they do or not.

Q. Who receives the mail for your Company?

A. Two or three different employes.

Q. Who receives the telegrams and things of that kind?

A. The telephone operator.

Q. You don't want to testify here that you examine all the mail that comes to this Company do you?

A. No, sir, I do not.

Q. Or all the telegrams or all the telephone calls?

A. Not all of them, no.

Q. And if there were letters that came to your Company quoting prices that you should submit, or territory which might be allocated, or customers which might be given to you—such a letter might come to your Company and you never see it mightn't it?

A. If any such letter ever come to my Company I would know it.

Q. What do you base that on?

A. My instructions to our office employes.

Q. To bring such a letter immediately to you?

A. Well, such letters that relate to customers or inquiries on prices to quote customers.

Q. You say you don't know anything about this information bureau that is maintained there, what its purpose was?

A. It is to get the—such information as they get in assisting the—the handling of business transactions legitimately.

Q. Well now just what was your understanding of the information [fol. 122] they were to furnish you?

A. Information regarding the character of the concern's work, the condition of——

Q. You mean a prospective customer?

A. A prospective customer, yes, sir.

Q. The kind of castings they required?

A. The kind of castings they required.

Q. Is that all the information that you understood they were to send you?

A. And the condition of their—well, they don't know the character of castings, the Association don't.

Q. Well, I don't understand what information you thought you were to get from this bureau.

A. All the information we ever got was as to who produced that work, or who had produced it.

Q. What work do you mean Mr. Hughes?

A. The work of any particular concern—who were producing the work of any particular concern.

Q. I am pretty dense I guess, for I don't understand what you mean.

Mr. Price: State how, after you got the information from the bureau as to the former source of supply, you would obtain information; would you obtain—go back to the Association and ask them for the information you wanted?

A. No. If we got an inquiry from a concern and I wanted some more information regarding that concern, or the work of that concern——

[fol. 123] Mr. Wilson: That is, the kind of material or product they turned out?

A. Yes. And I could ask the Association for who was making that work, or who had listed them as a customer. I could use my own judgment, if I wanted to go any further, and ask the concern who had been making it, for further information if I so desired. But I considered it my perfect right and privilege to quote it direct

without getting any more information if I could get that information.

Q. Now what other information did you receive from this Company besides that?

A. I received the information as to prices of business closed.

Q. What is that?

A. The prices of the business that was closed.

Q. What do you mean by that?

A. The price of any contract that might be let that was already let.

Q. That is, what some other company had agreed to furnish——

A. No, sir, not what they had agreed to; what they had already entered into contract to furnish.

Q. Entered into contract to furnish. You got that information?

A. You could if you so desired.

Q. What did you use that information for?

A. That would be in response to an inquiry. You could use that information if you lost a customer.

Q. Well, how did you use it?

[fol. 124] A. Give you the information how much the other fellow beat your price if he got the business.

Q. And the next time why you could——

A. I could beat his.

Q. You could beat his the next time.

A. If I could do it consistently and according to good business judgment.

Q. And that was the reason, the sole reason, for sending in those closed contracts was it, to this Association?

A. So far as I know.

Q. Did your Company send in closed contracts of that kind so another firm could beat you if he could beat you the next time?

A. We sent in closed contract prices, yes, sir.

Q. And you were willing to do that, knowing that somebody else was going to use that to beat your price?

A. Not necessarily knowing that. That would be up to them.

Q. You sent it in there for that sole purpose?

A. No, not for that sole purpose.

Q. What other purpose?

A. Covering business closed.

Q. Well, why would the Association care about your business closed?

A. That would give some information as to the general trend, possibly, of prices, general market conditions.

Q. That was the sole reason you sent it in, was to let them know what you were furnishing stuff for?

[fol. 125] A. So far as I know, yes, sir.

Q. That wasn't your idea at all was it Mr. Hughes? Wasn't it sent in there for the reason to show that the various members of this Association were living up to their agreements?

A. No, sir, it was not.

Q. Now you had listed with this Association all the customers you furnished; didn't you?

A. No.

Q. You didn't list them that way?

A. Listed them covering a certain period.

Q. Well now supposing your fiscal year—did you list all the customers you furnished for that year?

A. We listed in September all the concerns for whom we had made castings the previous six months.

Q. That was with the Association; you sent in the list?

A. Yes.

Q. And what was the idea of sending in that list?

A. To give other concerns the benefit of inquiry if they cared to make inquiry regarding the character of that concern's work or any one of those concerns' work.

Q. So they could write to you and find out what you were making for them?

A. No, sir. So they could get information regarding pattern equipment and the character of the work.

Q. And how much you were furnishing them for?

A. No, sir.

Q. Nobody ever wrote you and asked you how much you was furnishing a certain contract for?

[fol. 126] A. Not except—unless the contract had been closed, and wanted to know if we got the business.

Q. They wouldn't need to write you direct for that would they? They could get it from the Association?

A. They could get it from the Association.

Q. And every member of this Association had every closed contract that they made in a certain period in that Association?

A. I don't know about anybody else. We didn't have half of ours in there.

Q. Just on your allocated territory, that is where you had——

A. Didn't have any allocated territory.

Q. How much did you pay Belt, do you know?

A. I don't know.

Q. What was the reason the metallurgical bureau was located at Albany, New York, and your information bureau at Cleveland, Ohio?

A. That is something beyond my knowledge, except that this man, Touceda, was hired and that is where he conducts his laboratory.

Q. But your information bureau was at Cleveland, Ohio, wasn't it?

A. Yes, sir.

Q. Did you ever communicate with the Association at Cleveland, Ohio, as to whom a certain customer had been assigned?

A. No, sir.

Q. Did your Company ever communicate with that Association, [fol. 127] at Cleveland, Ohio, as to whom a certain customer had been assigned?

A. No, sir.

Q. Nobody in your Company or nobody that ever had any connection with your Company ever communicated along that line?

A. Not to my knowledge.
Q. Well, if they did would you have knowledge of it?
A. They wouldn't under my instructions.
Q. Well, if they did would you have knowledge of it?
A. I might not if some inferior officer would happen to write something.
Q. What I want to get at is this, suppose the Government now Mr. Hughes has in its possession a communication from your Company to this Association asking about certain customers and who they were assigned to; if the Government has such a communication as that would you know whether it had been sent or not?
A. I probably would.
Q. And now I want to ask you whether or not such a communication was ever sent by your Company?
A. No communication asking regarding the assignment of a customer. We might have asked who made the work of a particular customer.
Q. But not anything about any assignment?
A. No, sir.
Q. Of prices, about prices of various articles?
A. Might have asked prices of business closed.
Q. Do you know how many members there are in this Association? [fol. 128] A. There are about sixty.
Q. Do you know the dues required from those various members?
A. The dues are $120.00 a year.
Q. Do all of those sixty members pay that?
A. I don't know.
Q. Did all of those sixty members pay 25¢ a ton on their tonnage?
A. I don't know.
Q. Do you know that only 47 of those 60 subscribed for this information service?
A. I don't know.
Q. You don't know that only a part of these members, who are members of this Association, malleable iron association, did not subscribe to this information bureau located at Cleveland, Ohio, do you?
A. I don't know what you mean by subscribed.
Q. Well, received the service.
A. No, I don't know a thing about anybody else's business.
Q. Were you ever an officer of this Association?
A. No, sir.
Q. Where did you send this $120.00 a year and $750.00?
A. To Cleveland.
Q. To Cleveland? And that $120.00 a year was for the service you received from Cleveland wasn't it?
A. For the service we received from Cleveland? That was for [fol. 129] the clerical help and the executive work of the Association in the office there at Cleveland.
Q. You don't know whether these thirteen or fourteen members that didn't belong to that service of the Association sent that $120.00 in or not do you?

A. It is my understanding that everybody paid their dues.

Mr. Wilson: I believe that is all.

Examination.

By the Comissioner:

Q. Mr. Hughes, there is just one question I would like to ask yo If you had some customer in mind, and say you wrote down to th Association, they would give you information as to the class castings they were using and the pattern equipment?

A. No, no. They would give me the name of the concern, any such concern listed that concern as a customer, so the informa tion would be available if I cared to follow the inquiry further.

Q. That is, you would have to get the condition of their patter equipment from the concern who had been making their castings Is that it?

A. Yes, sir.

[fol. 130] Redirect examination.

By Mr. Price:

Q. It isn't only the condition of the pattern equipment, but th nature of the casting?

A. That is absolutely necessary. You can't cope with it without knowing the nature of the casting.

Q. Did the financial standing of the prospective customer have anything to do with it?

A. Yes, the responsibility of the concern is the general inquiry you always make in any inquiry.

Q. Did you make inquiry as to the financial standing of these ten per cent—in the cases in which you made inquiry of the Associa- tion and got back word saying that such and such a manufacturer had been supplying, did you ask that manufacturer in many in- stances about the financial standing?

A. Yes, I did, if I did not already have that information.

Q. And their desirability as a customer, whether they were con- tentious or otherwise?

A. Yes, sir, that would have its bearing.

Q. Now Mr. Hughes, in about what percentage of this business closed did you send in reports to the Association?

A. You mean in relation to the number of customers or tonnage or what?

Q. Yes, number of customers. What percentage of them did you send in reports to the Association of business closed?

A. I will have to guess at that somewhat, but it would not exceed twenty-five per cent.

[fol. 131] Q. And your inquiries which you made of the Associa- tion were in only about ten per cent of the cases?

A. Yes, sir.

Q. Now this money that you sent to the Association, whatever it is, in the neighborhood of 25¢ a ton, was that to be used in defraying the expenses of the research work carried on by the Association?

A. Yes. That went to the jurisdiction of the research committee for advertising and conducting of the laboratory and for salaries of the metallurgical engineers and inspectors.

Q. Did you ever get from the Association any results of that research work?

A. Yes, sir.

Q. And state whether or not that was useful in your business and in enabling you to turn out satisfactory work for your customers.

A. It was very useful; technical papers covering different aspects in relation to the production of malleable iron castings and the preparation of the material, the matter of combustion, fuel oil, coke and coal, matters of annealing, the handling of annealing, annealing construction.

Q. Were those matters discussed at the meetings of the Association which you attended?

A. Yes, sir, very much in detail.

Mr. Price: That is all.

Mr. Wilson: That is all.

Witness excused.

[fol. 132] Colloquy Between Commission and Counsel

Mr. Price: Now if Your Honor would be willing to follow this further and let us bring in customer witnesses, perhaps in the light of what you have learned about the business this afternoon you would be willing to reconsider that decision and allow us to follow the thing further.

The Commissioner: I don't see where that would be material. I think that would be purely defensive, if the evidence was of the same class as was given by Mr. Blackburn and Mr. Scott, who were buyers of malleable iron castings used by them in the manufacture of machinery and other things that they were making. They naturally wouldn't know anything about a contract with this Malleable Castings Association and whether they regulated prices or not.

(Exception.)

The matter was further argued.

3:45 o'clock P. M. Evidence closed.

Mr Price and Mr. Wilson made short arguments on the merits of the case.

The Commissioner: I feel Mr. Price that on the showing made here by the evidence introduced by the Government and the defendant and by the Government on cross examination of Mr. Hughes that there is enough evidence here to show that there is some agreement and sustaining the Government's claim of probable cause for

holding the defendant as a member of this Association charged with restraint of trade under the Anti-Trust Act. And with the evidence closed, the Court holds there is probable cause and the defendant will be committed and the bail fixed at $5,000.00 pending the issuance of the order of removal.

(Exception.)
End.

[fol. 133] REPORTER'S CERTIFICATE

I, Arthur M Bartlett, hereby certify that I am a shorthand reporter, at this time employed as one of the official shorthand reporters in the District Court of Iowa, for the Second Judicial District, and certified under the laws of the State of Iowa. That I am employed to report the foregoing hearing in the case of United States of America vs. National Malleable & Steel Castings Company, et al., Indictment No. 8015, In the District Court of the United States of America, For the Northern District of Ohio, Eastern Division, upon a complaint for the removal of the defendant, W. V. Hughes. That the foregoing transcript, consisting of sheets numbered from 1 to 101, is a full, true and complete transcript of the evidence introduced upon said hearing, and all offers thereof, together with all documents identified and offered, all objections, rulings and exceptions to such rulings.

Witness my hand this 31st day of December, 1924.

(Sgd.) Arthur M. Bartlett.

Wherever the words "test buyers" appears in this record it should be "test bars." (Sgd.) Arthur M. Bartlett.

[fol. 133½] To the Honorable Martin J. Wade, Judge of United State District Court, Southern District of Iowa, Ottumwa Division:

As United States Commissioner before whom the above matter was presented on the Information for Removal, will say that I herewith return the Summons together with all papers filed in connection with said case, which are the Information or Complaint for Removal; Certified Copy of the Indictment returned by the Grand Jury of the Northern District of Ohio, Eastern Division, against said Defendant; Bench Warrant; Commissioner's Warrant of Arrest on Removal Complaint; and Bond for Appearance of Defendant before Commissioner; and a Transcript of the Evidence taken before Commissioner in the Hearing of said Matter, which includes the Ruling of the Commissioner on the Admission or Refusal of Evidence offered and the same is hereby filed in the Office of the Clerk as directed by the said Order of Court.

Dated at Ottumwa, Iowa, this 10th day of January, 1925.

(Sgd.) Ernest R. Mitchell, U. S. Commissioner, Southern District of Iowa, Ottumwa Division.

[File endorsement omitted.]

[fol. 134] IN UNITED STATES DISTRICT COURT

WRIT OF HABEAS CORPUS AND MARSHAL'S RETURN—Filed Jan. 18, 1925

The President of the United States of America to Roy B. Gault, United States Marshal:

You are hereby commanded to have the body of Walter V. Hughes by you unlawfully detained as it is alleged before the undersigned Judge of the District Court of the United States, assigned to and in and for the Southern District of Iowa, at Ottumwa, Iowa, on the 20th day of January, A. D. 1925, at ten o'clock A. M. of said day to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises.

Witness the Honorable Martin J. Wade, United States District Judge, at Des Moines, Iowa, this 30th day of December, A. D. 1924.

(Sgd.) N. F. Reed, Clerk United States District Court, Southern District of Iowa. (Seal.)

[fol. 135] Marshal's Return

This Writ came into my hands on the 31st day of December A. D. 1924. Prior to and at the time of the order of Court directing the issuance of the said Writ and fixing bail in the sum of five thousand dollars, the said Walter V. Hughes, named in said Writ, was in my custody under order of Commissioner E. R. Mitchell, committing said Walter V. Hughes pending application for warrant of removal to the Northern District of Ohio, Eastern Division. After the Court ordered the issuance of said Writ said Walter V. Hughes furnished bail for appearance in court at Ottumwa, Iowa, on January 20, 1925, in accordance with said Order of Court.

(Sgd.) Roy B. Gault, United States Marshal.

[File endorsement omitted.]

[fol. 136] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed April 10, 1925

When we compare and analyze all the authorities submitted in the very complete briefs of counsel, the only real question in this case is the sufficiency of the indictment.

If the indictment is sufficient and the identity of the defendant is admitted or proven, a complete case for removal is established.

Language is found in the cases which seem to indicate that the defendant is entitled to a hearing upon the merits of the question

of guilt or innocence, but this question was very definitely disposed of by the Circuit Court of Appeals in this Eighth Circuit in the recent case of Looney v. Romeno, U. S. Marshal — Fed. — in which it is said:

"Position of the appellant at the hearing, and his evidence, was simply to the effect that he did not commit the crime; that of course is a matter to be tried out under the indictment."

It is my duty to follow this last announcement of the Court of Appeals of this Circuit.

As to the indictment, my duty seems to be well expressed in the Opinion of Judge McKeehan in the U. S. v. Mathues, U. S. [fol. 137] Marshal (4 cases), in which he says:

"After a careful consideration of this case, I am clearly of the opinion that the questions that exist regarding the sufficiency of this indictment on the three elements concerning which it is my duty to inquire, are of such a doubtful and disputable nature, that they belong to the trial court and the appellate tribunals which will or may review the proceedings there had. Demurrers to this indictment and motions to quash, were filed by a number of the defendants before the trial court. Judge Westenhaver, in an opinion which I have examined, sustained the sufficiency of the indictment. It is urged that this opinion passed on the indictment simply as a pleading and not as a paper averring certain evidential facts. No doubt an indictment might be insufficient as a pleading for some reason not involved in an inquiry as to its sufficiency in an application for a warrant of removal. But it does not follow that the converse is true, and I think that upon a demurrer or a motion to quash in a Federal Court, an indictment which is insufficient on any of the elements involved in an application for removal, could not be sustained. It is further urged that the decision of the learned Judge of the trial court is not binding upon this court. That is probably true, but it has a very great weight here as bearing on the probable sufficiency of this indictment. Having regard to the rule that doubtful issues of law and fact in proceedings of this nature are for the trial court, and having regard to the averments contained in this indictment and to Judge Westerhaver's opinion, I think this court would be taking a long and unjustifiable step in refusing to order the removal of these defendants on the ground that the indictment is clearly insufficient on any of the three elements involved in this inquiry. This case furnishes a good illustration of the importance of adherence to the rule that doubtful and disputable questions are for the trial court. Suppose, by way of illustration, that on application for the removal of say twenty of the defendants, various District Judges decide that they shall be removed, and that various District Judges decide as to another [fol. 138] twenty, that the indictment is insufficient and they shall not be removed. Suppose then that a trial and conviction is had in the District Court for the Northern District of Ohio, and the conviction sustained by the Circuit Court of Appeals for the Sixth

Circuit, and later by the Supreme Court of the United States. The net result would be that twenty defendants would have escaped trial, because various District Judges had made erroneous decisions as to the sufficiency of the indictment. It is important in the interest of protecting individual rights, that no defendant shall be ordered removed for trial to another district, unless a qualified judicial officer shall determine after examination of the indictment, that due cause for removal exists. It is equally important, in the interest of an effective administration and enforcement of law that every Judge to whom application for a warrant of removal is made, shall not undertake to make his own independent decision on doubtful and disputable questions, but that these shall be raised and determined in the trial court, and reviewed and determined finally by the appropriate superior judicial authority."

So far as the indictment in this case is concerned, it is a general rule that if a certain District Court decides a case, such decision is by comity binding upon other District Courts until it is passed upon by some higher court. This is true though the first court decides only a principle involved, even though it arises in an entirely different case.

Now this being generally true, the rule should have special application in a case like this, where the indictment has been reviewed fully by Judge Westenhaver the trial Judge, who says:

"In my opinion after due consideration to all objections urged and examination of adjudged cases, the indictment is unexceptionable both as to form and substance."

It seems to me that this should be final at this stage of the case. In fact, it would almost seem like audacity for me to hold contrary to the opinion of Judge Westenhaver who gave the case most careful consideration, and before whom many of the defendants are to be tried, as the record now stands.

[fol. 139] The petition for Habeas Corpus will be denied, and an order of removal will be prepared by the District Attorney and submitted to counsel for the plaintiff for objections or suggestions.

(Signed) Martin J. Wade, Judge.

[fol. 140] IN UNITED STATES DISTRICT COURT

ORDER DISCHARGING WRIT OF HABEAS CORPUS—Filed April 29, 1925

The above entitled matter coming on for hearing before me this 29th day of April 1925.

It is ordered that the writ be discharged and the petitioner W. V. Hughes remanded to the custody of the Marshall. To which order the petitioner excepts.

(Sgd.) Martin J. Wade, District Judge.

[File endorsement omitted.]

[fol. 141] IN UNITED STATES DISTRICT COURT

ORDER FOR REMOVAL—Filed April 29, 1925

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

The President of the United States to the Marshall of the Southern District of Iowa, Greeting:

Whereas, it has been made to appear that an indictment has been returned and filed against W. V. Hughes, and other persons and corporations, in the District Court of the United States, for the Northern District of Ohio, charging the said W. V. Hughes and other persons and corporations with engaging in a combination in restraint of interstate trade and commerce in malleable iron castings, in violation of the Act of Congress of July 2, 1890, commonly called the Sherman Anti-trust Act; and whereas it has sufficiently appeared that the said W. V. Hughes was the identical person named in said indictment, and a certified copy thereof filed herein furnished probable cause to believe him guilty of the offense therein charged; and whereas the said defendant has failed and refused to give bail heretofore fixed and required by the United States Commissioner; and whereas defendant obtained a writ of habeas corpus which has this day been discharged by the order and judgment of this court; [fols. 142 & 143] and whereas the defendant has this day taken an appeal from said order and judgment to the Supreme Court of the United States,

You are hereby commanded seasonably to remove the said W. V. Hughes hence to the said Eastern Division of the Northern District of Ohio and there surrender him to the Marshal of that district there to be dealt with according to law; but execution of this order is suspended pending the determination of said appeal.

And you will make due return of this warrant to the Clerk of the District Court of the United States for the Southern District of Iowa, with a true statement of how you executed the same.

To which order the defendant excepts.

Dated this 29th day of April A. D. 1925.

(Sgd.) Martin J. Wade, Judge.

[File endorsement omitted.]

[fols. 144 & 145] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, OTTUMWA DIVISION

No. ———

UNITED STATES OF AMERICA EX REL. W. V. HUGHES

vs.

ROY B. GAULT, United States Marshal

PETITION FOR APPEAL—Filed April 29, 1925

Now comes the above named W. V. Hughes, petitioner in the above entitled cause, by Butler, Lamb, Foster & Pope, and Jaques, Tisdale & Jaques, his attorneys, and considering himself aggrieved by the order and judgment made and entered in the above entitled cause on the 29th day of April, 1925, does hereby appeal from said order and judgment to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith and prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the record of proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Sgd.) Butler, Lamb, Foster & Pope, Jaques, Tisdale & Jaques, Attorneys for Petitioner.

[fol. 146] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 29, 1925

Now comes the above named W. V. Hughes, petitioner in the above entitled cause, by Butler Lamb Foster & Pope and Jaques Tisdale and Jaques, his attorneys, and files herewith his petition for appeal to the Supreme Court of the United States from the order and Judgment made and entered in the above entitled cause on the 29 day of April, 1925, and shows as assignment of errors on which he relies to reverse said order and judgment that in the record and proceeding in said cause and in said order and judgment there is manifest error in this, to-wit:

The District Court erred:

I

In not holding that the detention of the petitioner by the said Roy B. Gault, United States Marshal, under the order of United States Commissioner E. R. Mitchell, committing petitioner to the

custody of said Marshal, was in violation of Section 2, Article III of the Constitution of the United States, for the reason that in the proceedings for removal before said Commissioner the United States did not introduce or present any evidence whatsoever to establish, or that would tend to establish, that there was probable cause to [fol. 147] believe that petitioner had committed a crime against the United States within the Northern District of Ohio, triable in said District, as purported to be charged in the complaint for removal filed with said Commissioner, except a certified copy of an indictment, returned in the District Court for said Northern District of Ohio, which did not state sufficient facts to show probable cause to believe petitioner had committed such a crime.

II

In not holding that, for the reason just stated in the proceeding assignment, the detention of the petitioner by the said Marshal under the order of said Commissioner, as aforesaid, was in violation of the Sixth Amendment to the Constitution of the United States.

III

In holding that the ruling of the District Court for the Northern District of Ohio, that the indictment returned in said Court was sufficient as a pleading, was binding on this Court in determining a different issue, namely, the issue of the sufficiency of said indictment as evidence of probable cause, and compelled this Court to hold that said indictment in itself constituted probable cause for believing that petitioner had committed an offence against the United States triable in the Northern District of Ohio, and necessitated the removal of petitioner, thus depriving petitioner of his constitutional rights under Section 2, Article III of the Constitution of the United States, and the Sixth Amendment to said Constitution.

IV

In not holding that the petitioner was entitled, under Section 2, [fol. 148] Article III of the Constitution of the United States and the Sixth Amendment to said Constitution, to show want of probable cause for believing that he had committed the crime purported to be charged in said complaint for removal.

V

In not holding that the detention of the petitioner by said United States Marshal under the order of said Commissioner, committing petitioner to the custody of said Marshal, was in violation of Section 2, Article III of the Constitution of the United States, for the reason that in said proceeding for removal said Commissioner refused to receive, excluded, struck out, and refused to consider, on the ground that it was defensive and not material, the testimony of the witness

Jasper Blackburn, shown on pages 5 to 37, inclusive, of the transcript, and the testimony of the witness Joseph A. Scott, shown on pages 38 to 44, inclusive, of the transcript, which said witnesses and their said testimony were offered on behalf of petitioner for the purpose of showing, and which did show, that the companies or concerns represented by said finding of the indictment, had been immediately preceding the finding of the indictment, had been actively and vigorously solicited for their business by active and aggressive competitors, co-defendants of petitioner; said testimony so excluded and each of said witnesses being competent and material to show and prove that there was no probable cause for believing that said petitioner was guilty of the offence charged in said complaint for removal, or any offence against the United States within the Northern District of Ohio and triable in the District Court for said district; the motions to strike said testimony being shown on pages 37 and 44 of the transcript and the order of the Commissioner strik-[fol. 149] ing out said testimony and refusing to consider the same, to which order the petitioner at the time duly excepted, being shown on page 54 of the transcript in the following language:

"In the light of the foregoing, it is my opinion that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible, and the motion to strike such evidence as has already been held of a defensive nature, made by counsel for the Government, is sustained."

thereby denying petition the right to offer proof on an issue to be determined by said Commissioner under the above-mentioned provisions of the Constitution.

VI

In not holding that, for the reason just stated in the preceding assignment, the detention of the petitioner by said United States Marshal under the order of said Commissioner, as aforesaid, was in violation of the Sixth Amendment to the Constitution of the United States.

VII

In not holding that the detention of the petitioner by said United States Marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, for the reason that in said proceeding for removal said Commissioner refused to receive and consider the testimony covered by the offer made by the petitioner shown on page 61 of the transcript in the following language:

"that during said period (meaning from January 1, 1917 to March 27, 1924) the said company has acquired all of its customers in the ordinary course of competitive trade, that such customers as it has retained during said period it has retained by means of fair prices and satisfactory service and not by any agreement or under-

standing with any person or corporation or association as to prices or terms or conditions of sale except the agreement between the particular customer and said company, and that such customers as it has [fol. 150] lost have been lost in the ordinary course of competitive trade and have not been assigned or allotted by said company or by the defendant or by any other person, corporation or association."

to which objection was made by the United States and sustained by the Commissioner in the following language shown on page 71 of the transcript:

"I think that all that evidence would be strictly defensive. The objection will be sustained to that."

to which ruling the petitioner at the time duly excepted, and by which rejection of evidence the said Commissioner denied the petitioner the right, to which he was entitled under the above mentioned provisions of the Constitution, to show that there was no probable cause for believing that he was guilty of the offence purported to be charged in said complaint for removal or of any offence against the United States within the Northern District of Ohio, triable in the District Court for said district.

VIIII

In not holding that for the reason just stated in the preceding assignment, the detention of the petitioner by said Marshal under the order of said Commissioner, as aforesaid, was in violation of the Sixth Amendment to the Constitution of the United States.

IX

In not holding that the detention of the petitioner by said United States Marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, for the reason that in said proceeding for removal said Commissioner refused to receive the testimony covered by the offer of the petitioner shown on page 74 of the transcript in the following language:

[fol. 151] "Defendant offers Exhibit D-7, (As appears on page 57 of the transcript, this was a list of the customers of Iowa Malleable Iron Company, with which company petitioner was affiliated) and D-8 in Evidence. * * * The defendant offers to show that the corporations or companies named in defendant's Exhibit D-8 were, under the first heading, obtained since 1918, and under,—that those under the second heading were lost since 1919."

to which objection was made by the United States and sustained by the Commissioner in the following language shown on page 74 of the transcript:

"The Court: The objection will be sustained.

Mr. Ross: Does the Court sustain it on the ground of incompetence?

The Commissioner: Well, I don't see that it is material to the issue here, and it is irrelevant.

Mr. Ross: Well, it probably isn't competent under our rule. We can supply the competency by Mr. Hughes' own personal knowledge, and I would like to have the record so show. Of course that memorandum there probably isn't competent now.

The Commissioner: Well, I am satisfied so far as Mr. Hughes is concerned, of his personal knowledge, so far as that is concerned.

Mr. Ross: But I would like to have the record show that it isn't sustained on the ground of incompetence.

The Commissioner: Well, it is sustained on the ground that it is purely defensive matter and doesn't rebut the question of probable cause.

All of which was duly excepted to."

which said offer of testimony was made by petitioner for the purpose of showing that there was active competition for the customers of the company with which petitioner was affiliated, many of which were acquired or lost during the period covered by the indictment, and that those so acquired or lost were in no way allotted or assigned, and as evidence showing that there was no probable cause for believing that petitioner was guilty of the offence purported to be charged in said complaint for removal or of any offence against the United States within the Northern District of Ohio, triable in the District Court for said district; thereby denying petitioner the right to offer [fol. 152] proof on an issue to be determined by said Commissioner under the above mentioned provisions of the Constitution.

X

In not holding that for the reason just stated in the preceding assignment, the detention of the petitioner by said Marshal under the order of said Commissioner, as aforesaid, was in violation of the Sxth Amendment to the Constitution of the United States.

XI

In not holding that the detention of the petitioner by said United States Marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, for the reason that in the proceeding for removal before said Commissioner, said Commissioner refused to receive the testimony covered by the offer of petitioner shown on page 101 of the transcript as follows:

"Now, if Your Honor would be willing to follow this further and let us bring in customer witnesses, perhaps in the light of what you

have learned about the business this afternoon you would be willing to reconsider that decision and allow us to follow the thing further."

as to which offer the Commissioner ruled as follows:

"I don't see where that would be material. I think that would be purely defensive."

to which ruling the petitioner at the time duly excepted, said offer having been made for the purpose of showing by competent witnesses present at the hearing that there was active and aggressive competition for the customers of the company with which petitioner was affiliated, carried on by petitioner's co-defendants during the three-year period immediately preceding the finding of the indictment, [fol. 153] as competent, material evidence showing that there was no probable cause for believing that petitioner was guilty of the offence purported to be charged in said complaint for removal or any offence against the United States within the Northern District of Ohio, triable in the District Court of said district, by which ruling said Commissioner denied petitioner the right to offer proof on an issue to be determined by said Commissioner under the above mentioned provisions of the Constitution.

XII

In not holding that for the reason just stated in the preceding assignment, the detention of the petitioner by said Marshal under the order of said Commissioner, as aforesaid was in violation of the Sixth Amendment to the Constitution of the United States.

XIII

In not holding that the detention of the petitioner by said United States Marshal under the order of said Commissioner, as aforesaid, was in violation of the Sixth Amendment to the Constitution of the United States, for the reason that in the hearing before said Commissioner the petitioner was not confronted by any witnesses testifying on behalf of the United States, the only evidence adduced on behalf of the United States being a certified copy of the said indictment returned in the Northern District of Ohio.

XIV

In not holding that the detention of the petitioner by said United States Marshal under the order of said Commissioner, as aforesaid, was without due process of law and in violation of the Fifth Amend- [fol. 154] ment to the Constitution of the United States, for the reason that the petitioner was denied full opportunity to be heard upon the issue of probable cause.

XV

In not holding that the detention of the petitioner by said Marshal under the order of said United States Commissioner, as aforesaid,

was in violation of the Sixth Amendment to the Constitution of the United States, for the reason that there was no competent evidence to sustain the finding of probable cause to believe that petitioner had committed any offence against the United States triable in the District Court for the Northern District of Ohio.

XVI

In holding that said indictment returned in the Northern District of Ohio states sufficient facts to charge the petitioner with the commission of an offence against the United States

XVII

In refusing to discharge the petitioner.

XVIII

In discharging the writ of habeas corpus.

By reason whereof, the petitioner prays that said judgment and order may be reversed and that he be ordered discharged.

(Sgd.) Butler, Lamb, Foster & Pope, Jaques, Tisdale & Jaques, Counsel for Petitioner.

[fol. 155] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BONDS—Filed April 29, 1925

The foregoing petition for appeal coming on to be heard this 29th day of April, 1925, and the assignment of errors filed in said cause being presented to the court with said petition for apppeal.

It is ordered, that the said appeal be allowed as prayed for and that the bail bond in the sum of $5,000 heretofore filed by the petitioner in this court stand pending the final determination of this appeal or until the Supreme Court otherwise direct, the appeal to act as a supersedeas. Cost Bond on appeal is hereby fixed in the sum of $250.00.

(Sgd.) Martin J. Wade, Judge.

Entered Jo. D, page 213.

[File endorsement omitted.]

[fol 156] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed April 29, 1925

To the Clerk of the District Court of the United States.

SIR: Please prepare the transcript of record for the appeal in the above entitled cause to the Supreme Court of the United States and incorporate in said transcript the following documents:

1. Petition for writ of habeas corpus and certiorari, including:
Exhibit A. Warrant issued by Commissioner Ernest R. Mitchell.
Exhibit B. Complaint filed before said Commissioner.
Exhibit C. Indictment returned in the Northern District of Ohio, Eastern Division, February term, 1924.
2. (a) Order of Honorable Martin J Wade, dated December 30, 1924, granting writ of habeas corpus and setting date for hearing.
(b) Writ of certiorari, dated December 30, 1924.
3. Marshal's return to writ of habeas corpus, dated January, 1925.
4. Transcript of hearing before Commissioner E. R. Mitchell.
5. Opinion of Judge Wade, rendered April 10, 1925.
[fol. 157] 6. Order of Judge Wade, Dated April 29, 1925, discharging writ of habeas corpus.
7. Petition for appeal.
8. Petitioner's assignment of errors on appeal.
9. Order allowing appeal and fixing appeal bond, dated April 29, 1925.
10. Warrant of Removal, dated April 29, 1925.
11. Citation.
12 Stipulation for record on appeal.
13. This præcipe.

Dated Des Moines, Iowa, April 29, 1925.
(Sgd.) Butler, Lamb, Foster & Pope, Jaques, Tisdale & Jaques, Attorneys for Appellant.

Service of a copy of the within præcipe is hereby acknowledged this 29th day of April, 1925.
(Sgd.) Frank F. Wilson, Assistant U. S. Attorney, Attorney for Appellee.

[File endorsement omitted.]

[fol. 158] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, N. F. Reed, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 157

pages to contain a full, true and complete transcript of the record of the case of United States of America, ex rel. W. V. Hughes, Plaintiff, vs. Roy B. Gault, United States Marshal, as called for by the designation of parts of the record filed by Plaintiff April 29th, 1925, as full, true and complete as the original thereof now on file and of record in office in the City of Ottumwa in said District, with the exception of Stipulation for record on appeal which has not been filed and is not a part of this record.

I further certify that I transmit herewith as part of the original printed transcript the original Citation with acceptance of service thereof by Attorneys for Defendant.

In witness whereof, I hereunto set my hand and affix the seal of said Court at Office in the City of Ottumwa in said District this 15th day of May, A. D., 1925.

N. F. Reed, Clerk U. S. District Court, Southern District of Iowa. (Seal U. S. District Court, District of Iowa.)

Endorsed on cover: File No. 31,236. S. Iowa D. C. U. S. Term No. 513. The United States of America ex rel. W. V. Hughes, appellant, vs. Roy B. Gault, United States marshal. Filed May 27, 1925. File No. 31,236.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 513

UNITED STATES OF AMERICA, *ex rel.* W. V. HUGHES,
Appellant,

vs.

ROY B. GAULT, United States Marshal,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLANT.

HERBERT POPE,
FRANK E. HARKNESS,
Attorneys for Appellant.

CHARLES E. HUGHES,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Supreme Court of the United States

OCTOBER TERM, 1925.

UNITED STATES OF AMERICA, *ex rel.* W. V. HUGHES, Appellant, *vs.* ROY B. GAULT, United States Marshal, Appellee.	No. 513

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF FOR APPELLANT.

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT.

The judgment appealed from was entered April 29, 1925, by the Honorable Martin J. Wade, sitting in the District Court for the Southern District of Iowa. It discharged a writ of habeas corpus theretofore issued on the appellant's petition, and remanded the appellant to the custody of the appellee (R. 75). The opinion of the Court is not reported but is included in the Record (R. 73-75).

The petition for the writ of habeas corpus alleged that the appellant was detained under color of an order of commitment made by a United States Commissioner in a pro-

ceeding for the appellant's removal from the Southern District of Iowa to the Northern District of Ohio, for trial upon an indictment returned in the latter district which purported to charge a violation of the Sherman Anti Trust Act; that said order was void and violated appellant's constitutional rights because (1) the indictment, which was the only evidence introduced by the Government to show probable cause to believe appellant guilty of an offense, was insufficient for that purpose (R. 3); (2) even if the indictment was sufficient to make a *prima facie* case of probable cause, this case was overcome by evidence on behalf of the appellant, which demonstrated his innocence (R. 4); (3) the Commissioner held that probable cause had been shown after arbitrarily excluding evidence offered on behalf of appellant tending to show lack of probable cause, (R. 4-5).

The evidence before the Commissioner and his rulings excluding evidence are shown by his return to a writ of certiorari issued in aid of the petition for habeas corpus (R. 17-72). For his rulings excluding evidence, see R. 44-46, 50, 54-55, 57-58, 71.

Upon the hearing on the return of the marshal to the writ of habeas corpus, and the return of the Commissioner to the writ of certiorari, the District Court ruled that the indictment and proof of appellant's identity made a complete case for removal regardless of the evidence received by the Commissioner on behalf of appellant. The court therefore refused to consider either the evidence introduced before the Commissioner on behalf of appellant or the rulings of the Commissioner excluding evidence offered on appellant's behalf (R. 73-75).

The ruling relied on by appellant as the basis of this court's jurisdiction is the ruling of the District Court hold-

ing that the indictment and proof of appellant's identity was conclusive of the right of the Government to an order of removal, and its refusal to consider the evidence introduced before the Commissioner on behalf of appellant, and to hold that upon this evidence the Commissioner had no power or authority to commit the appellant, and that the order of commitment violated the appellant's rights under the Constitution of the United States.

The statutory provision upon which the appellant predicates the jurisdiction of this court is Section 238 of the Judicial Code as it existed prior to May 13, 1925, the effective date of the act entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court and for other purposes," approved February 13, 1925, and particularly the provision of that section authorizing a direct appeal from a district court of the United States to the Supreme Court in any case "that involves the construction or application of the Constitution of the United States." 5 Fed. Stat. Ann. (2nd ed.) 794.

The appellant relies upon *Tinsley* v. *Treat,* 205 U. S. 20, as showing that the case at bar involves the construction or application of the Constitution of the United States.

Statement of Case.

This is an appeal from an order of the District Court of the United States for the Southern District of Iowa, entered April 29, 1925, by the Honorable Martin J. Wade, District Judge, discharging a writ of habeas corpus sued out by appellant, and remanding him to the custody of appellee (R. 75) to be held under the terms of an order entered by a United States Commissioner committing appellant

pending an application to the District Court for appellant's removal to the Northern District of Ohio. (R. 73).

The petition for the writ of habeas corpus (R. 1-5) alleged that the appellant was detained by the appellee under an order of commitment entered by a United States Commissioner in a proceeding for the removal of the appellant to the Northern District of Ohio, Eastern Division, for trial under an indictment returned in the District Court for that district in which the appellant was named as a defendant. The proceeding was instituted by the filing of a complaint purporting to charge the appellant with a violation of the Sherman Anti-Trust Act. This complaint referred to and was accompanied by a certified copy of an indictment returned March 27, 1924, in the District Court for the Northern District of Ohio, Eastern Division, purporting to charge the appellant, together with forty-eight other natural persons and forty-six corporations, with having engaged in an unlawful combination in restraint of interstate trade and commerce in malleable iron castings. Copies of the complaint and indictment were attached to the petition as Exhibits B and C respectively (R. 2, 6, 8).

The petition charged that in the proceedings before the Commissioner there was no competent evidence to justify an order of removal and also that the Commissioner had violated the appellant's right to a hearing on the question of probable cause by excluding material evidence tending to show want of probable cause. In addition to the prayer for the writ of habeas corpus the petition prayed for a writ of certiorari directed to the Commissioner requiring him to certify the proceedings before him to the court (R. 5).

Both of these writs issued (R. 15-16) and the Commissioner made return to the writ of certiorari by filing a

stenographic transcript of the proceedings and evidence before him (R. 16-72).

From this transcript it appears that the Government rested its case after introducing a certified copy of the indictment in evidence and procuring an admission that the appellant was the W. V. Hughes named in the indictment, and that thereupon counsel for appellant moved the dismissal of the complaint on the ground that probable cause had not been shown (R. 17).

The indictment, which constituted the Government's proof of probable cause, consists of one count only. It alleges that the corporations made defendants were, during a period commencing January 1, 1917, and ending March 27, 1924, the date of the return of the indictment, engaged in interstate commerce in malleable iron castings, and were producing about 500,000 tons of such castings per year or approximately 75 per cent of the total production in the United States (R. 8-12), and that all of said corporations were members of a voluntary trade association with headquarters at Cleveland, Ohio, known as the American Malleable Castings Association, through and by means of which the unlawful combination hereinafter more fully described has been largely carried out" (R. 14).

As to appellant and the other natural persons named as defendants (except one Robert E. Belt who is alleged to have been the secretary of the association) the indictment alleges (R. 12) that the defendant corporations

> "throughout the said period of time respectively have had divers officers and agents who have been actively engaged in the management, direction and control of their affairs and business and of their said interstate trade and commerce, and that a list of the

> names of such officers and agents, so far as they are known to said grand jurors (Christian names unknown to said grand jurors being indicated by initial letters), showing with which of said corporations they have been affiliated during said period of time, is as follows, to wit:"

and there follows a list in which the name of appellant appears as having been affiliated with the Iowa Malleable Iron Company (R. 13).

There is no allegation in the indictment defining the connection of the appellant with this company save the statement that he was "affiliated" with it as one of its "divers officers and agents," nor is there any allegation, either in the inducement or in the charging part of the indictment, of any act performed or any order given by the appellant, either in his capacity as a corporate officer or agent or in any other capacity.

The charging part of the indictment consists of the fourth, fifth and sixth paragraphs. In the fourth paragraph (R. 14) it is alleged, by way of introduction and substantially in the language of the Sherman Act, that in the Northern District of Ohio all the defendants unlawfully engaged in a combination in restraint of interstate trade and commerce in malleable iron castings, "that is to say, in a combination now here described in restraint of, and which throughout said period of time, has unlawfully restrained said trade and commerce, in the manner hereinafter set forth."

The fifth paragraph (R. 14) then proceeds to describe the alleged combination as follows:

> "Throughout said period of time said corporate defendants, under said management, direction and

control of their said officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves, as to prices, terms and conditions of sale, and as to customers; and, by agreement, have from time to time fixed excessive and noncompetitive prices to be charged by all of them for said castings, and have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers, and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned."

The sixth paragraph (R. 14) alleges that

"As a means of securing compliance on the part of each of said corporate defendants with the terms of said agreements, said corporate defendants, throughout said period of time, have been members of and have maintained an organization known as the American Malleable Castings Association, with headquarters at Cleveland, Ohio, and have required said Association, among other things, to collect and receive from each of its members information as to the details of such member's business, and to distribute such information among all the members for their use in avoiding and preventing breaches of said agreements."

The seventh and final paragraph (R. 15) consists only of the formal allegation that the defendants "in the man-

ner and form aforesaid unlawfully have engaged in a combination in restraint of trade and commerce among the several states in malleable iron castings, against the peace and dignity of the United States," etc.

The Commissioner reserved his ruling upon the appellant's motion to dismiss because of the insufficiency of the indictment to show probable cause, and proceeded to take the testimony of two witnesses on behalf of appellant, subject to objection and motion to strike on behalf of the Government on the ground that the testimony was not in rebuttal of probable cause but in defense of the "main action" (R. 20, 22, 36, 41, 43, 44).

These witnesses were Jasper Blackburn, President and General Manager of the Everstick Anchor Company, and Joseph A. Scott, Secretary and General Manager of Brown, Lynch & Scott Company.

The plant of the Everstick Anchor Company was located at St. Louis, Missouri. The witness, Blackburn, testified that during the three years next preceding the indictment it had bought its castings mainly from the appellant's company which was located at Fairfield, Iowa (R. 19); that there were two manufacturers of malleable castings located at St. Louis, the St. Louis Malleable Castings Company, and the National Malleable and Steel Castings Company (R. 19, 25) (both of which are named as defendants in the indictment, R. 9, 10); that these companies and, in addition, the Badger Malleable Iron Company of South Milwaukee, Wisconsin, the Danville Malleable Iron Company of Danville, Illinois, the Zanesville Malleable Iron Company of Zanesville, Ohio, and the Wisconsin Malleable Iron Company (all of which are defendants in the case) had solicited his business during the three-year period

(R. 20, 21, 25, 26, 27, 28, 30-31). The witness also testified that he thought the Illinois Malleable Iron Company of Chicago, and the Dayton Malleable Iron Company of Dayton, Ohio, also solicited him during this period but was not sure (R. 26, 27).

The prices submitted to the witness by some of these concerns were in some instances lower than the prices of the Iowa Malleable Iron Company (R. 24-25, 29, 34, 35); at one time the St. Louis Malleable Castings Company had made castings for his company, and on the greater part of the tonnage its prices were lower than the Iowa Malleable Iron Company's prices. The latter company's prices were f. o. b. Fairfield, and the former company's f. o. b. St. Louis (R. 36). Price was not the only consideration which governed witness in the purchase of castings. Confidence in the business methods of the Iowa Company was an element in the situation (R. 25). Witness never understood or had any reason to believe that there was any arrangement by which he was restricted to dealing with the Iowa Malleable Iron Company (R. 24, 29, 30). He kept in touch with the market and considered the prices charged by the Iowa Company fair and reasonable (R. 32-33).

The witness Scott was located at Monmouth, Illinois. The Brown, Lynch & Scott Company, of which he was general manager, made agricultural implements, and he had had during the three years next preceding the indictment the entire charge of the purchase of malleable castings used by it (R. 37). During this period he purchased all of his castings from the Iowa Malleable Iron Company (R. 37). He was urgently solicited by other concerns for his business at prices which were in some instances lower than those charged by the Iowa Company (R. 38, 39). Among

these concerns were the Peoria Malleable Iron Company, the Vermilion Malleable Iron Company and the Stowell Company (R. 38). The two companies last named are defendants to the indictment (R. 11). There was considerable expense involved in moving patterns from one foundry to another and the Iowa Company had given excellent service and excellent quality of material for a good many years, and the difference in price didn't justify taking the business away from it (R. 39). The witness considered the Iowa Company's prices fair and reasonable (R. 39-40).

After an adjournment the Commissioner filed a written opinion on the questions reserved as above stated. As to the indictment, he said that "while the indictment may not be drawn with that clearness as to specify the acts of individual defendants constituting the offense, as might be done by some in the drawing of indictments," still it charged an offense against the Government and justified the Commissioner "in finding the defendant to be a fugitive from justice" (R. 45). On the motion to strike, he held "that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible and the motion to strike such evidence as has already been heard of a defensive nature is sustained" (R. 46). That this ruling included the entire testimony of the witnesses Blackburn and Scott was subsequently made clear (R. 57-58).

The effect of this ruling was to confine the evidence in rebuttal to the testimony of appellant. He testified that he was Secretary and General Manager of the Iowa Malleable Iron Company, and during the three years next preceding the indictment was in general charge of the company's affairs and did most of the soliciting of business. About fifteen per cent of the business was agricultural im-

plement work, about thirty per cent street car and railroad car castings, and the balance miscellaneous. He was then asked to describe the process of manufacturing of castings and the question was objected to as immaterial and the objection sustained (R. 42-43).

The Iowa Malleable Iron Company joined the American Malleable Castings Association in 1914 or 1915; at this time the company was producing a very inferior product, and its object in joining the Association was to obtain the benefit of the research and laboratory work upon which the Association was then embarking (R. 50-51). The Association maintained a laboratory at Albany, New York, in charge of a chemist and consulting engineer, and this laboratory kept a continuous check upon the quality of iron produced by each foundry and issued certificates to members whose product met the Association requirements as to quality showing that they were producers of "certified malleable iron castings" (R. 51-52). At the time the Iowa Company joined the Association the standard of the American Society For Testing Materials was 35,000 pounds tensile strength, and a capacity of five per cent elongation in two inches. These specifications have been increased to 50,000 pounds and ten per cent (R. 51).

The Association also carried on exhaustive research work in regard to materials for melting and annealing furnaces, methods of constructing and operating them, and other manufacturing problems. The Iowa Company found that technical research was essential to the maintenance of the quality of its product, and its sole object in joining the Association was to get the benefit of this work (R. 52).

The research work was maintained by an assessment based on the tonnage produced by the member. During the

three years period before the indictment this assessment amounted to about $750 for the Iowa Company (R. 58). In addition each member paid dues at the rate of $120 a year, which went to the maintenance of an Association office at Cleveland. There were about sixty members in the Association (R. 69).

Appellant was never an officer of the Association. He attended its meetings when they were held in Chicago. Neither prices, terms and conditions of sale nor allocation of customers were discussed in the meetings, although the witness had conversed with individual members about market conditions (R. 53). The witness had never discussed with members the allocation of customers generally or the allotment of any particular customer (R. 52-53). Asked whether he had ever discussed the fixing of prices with any officer or member, he said he had not, except in 1918 at the instigation of the War Industries Board. This was objected to by the Government as being immaterial because it was six years before the return of the indictment, and the objection was sustained (R. 53).

The Iowa Company made it a practice to solicit trade by letters to possible purchasers. These letters were sent out without any consultation with the Association or any member as to the propriety of soliciting a given customer, and defendant was never requested by any member or by the Association not to solicit a consumer, nor did he ever ask any other manufacturer to refrain from soliciting one of his customers (R. 54). He was asked what he did when he received an inquiry from a consumer of malleable castings before quoting him, and the question was objected to as being evidence purely in defense and not in rebuttal of probable cause. The Commissioner ruled that the question re-

lated to "defensive matter" and sustained the objection (R. 54). Like rulings were made on a question as to whether appellant ever declined to quote upon inquiries from consumers and a question whether his company had supplied castings to the American Car Company (R. 55).

The witness was then permitted to and did categorically deny the charges as to agreements to eliminate competition, the fixing of prices and the allotting of customers contained in the fifth paragraph of the indictment (R. 55-56).

A list of the company's customers, identified as Exhibit D 7 was produced. This was originally objected to as not being the best evidence, and the objection was sustained (R. 47-48). The appellant then testified that he obtained the Alexander Manufacturing Company as a customer about 1915 or 1916. He was asked how he obtained its business and the Government objected on the ground that the question pertained to matter in defense.

In the colloquy which followed, counsel for appellant indicated that in order to prove that the customers were acquired and kept in the ordinary course of competitive trade, he proposed to interrogate appellant as to how he obtained the business of each customer and how he retained it or lost it as the case might be, and the Commissioner took the view that such evidence would be a matter for the jury and not for the Commissioner (R. 50).

Subsequently appellant testified generally that all of the customers upon the list were acquired in the ordinary course of competitive trade and that none of them was retained by means of any agreement with any other person, corporation or association; that appellant kept the trade of the company's customers by fair dealing, fair prices and the quality of its material and service, and that

customers who left the company did so by reason of competitive conditions, in which witness included prices, deliveries and quality (R. 56-57).

The question of the admissibility of the customer list recurring, upon an offer by appellant's counsel to make the list competent by the testimony of appellant, the Commission ruled that it should be excluded, not on the ground that it was incompetent, but because it was irrelevant, being "purely defensive matter" and not rebuttal on the question of probable cause (R. 57). He also said that the same ruling would apply to the testimony of buyers of malleable iron and a character similar to that of the witnesses Blackburn and Scott (R. 57-58).

On cross-examination appellant testified to the existence of an information service maintained by the Association through which members might obtain information as to prospective customers. Counsel for appellant pointed out to the Commissioner that he had endeavored to open this line of inquiry upon direct examination and had been prevented from doing so, and he thereupon resumed the direct examination (R. 62). The direct examination and the cross-examination upon this matter brought out the following facts. Malleable castings as a rule are manufactured from the customer's own patterns to suit his particular requirements, and in figuring on a casting from patterns with which the manufacturer is not familiar it is important to know the character of the casting and the character and condition of the pattern equipment. Information upon these points, and also as to the customer's credit and habits of dealing, could be obtained from a foundry which had manufactured that casting, and in some instances it was possible to ascertain the name of such a

foundry from the secretary of the Association (R. 62-64, 66, 70). The appellant's company filed with the secretary every six months a list of the customers it had been serving in the preceding six months' period (R. 66-67), and upon inquiring of the secretary as to a particular customer it could obtain from him the name of any other member who had listed that customer (R. 66). Having received that information appellant exercised his own judgment as to whether he would communicate with the member for the purpose of getting further information (R. 66-67).

In cases in which members had reported to the secretary the prices at which they had accepted orders from customers, other members could also obtain that information (R. 67). These reports related only to closed transactions (R. 67, 69, 70). The appellant did not know to what extent other members reported such closed transactions (R. 68). His company made such reports upon not to exceed 25 per cent of its business, and made inquiries of the secretary for information as to about ten per cent of the new trades (R. 65, 70). Neither the appellant nor the Iowa Company ever communicated with the Association as to any assignment of any customer to any manufacturer (R. 68-69). No customer was ever assigned to the company by the secretary, nor did the appellant ever hear of any such thing as the assignment of customers (R. 61).

Upon this record the Commissioner found the existence of probable cause for "holding the defendant as a member of this Association charged with restraint of trade under the Anti-Trust Act", and committed the appellant (R. 71-72).

The case came on for hearing before the District Court upon the marshal's return to the writ of habeas corpus,

alleging that he held the appellant under the Commissioner's order of commitment, and upon the transcript of the proceedings before the Commissioner; and on April 10, 1925, the District Judge handed down his opinion (R. 73-75). He refused to consider either the evidence introduced before the Commissioner or the rulings of the Commissioner excluding evidence, holding that under the decision of the Circuit Court of Appeals for the Eighth Circuit in *Looney* v. *Romero*, 2 Fed. (2nd) 22, the defendant was not entitled to controvert the truth of the allegations in the indictment, and therefore the only question before him was the question of the sufficiency of the indictment (R. 73-74). He also refused to determine this question for himself because, Judge Westenhaver having overruled demurrers filed by other defendants in the trial court, he felt that this decision was "by comity" binding upon him (R. 75). And he therefore entered the order, from which this appeal is prosecuted, discharging the writ of habeas corpus and remanding appellant to the custody of the marshal (R. 75).

Specification of Assigned Errors Intended to Be Urged.

The District Court erred:

1. In discharging the writ of habeas corpus.

2. In refusing to discharge the appellant.

3. In holding that the indictment introduced in evidence on behalf of the Government was sufficient evidence of probable cause to believe the appellant guilty of an offense against the United States.

4. In not holding that the detention of the appellant by the marshal under the order of the United States Commissioner, was in violation of the Sixth Amendment to the Constitution of the United States, for the reason that there was no competent evidence to sustain the finding of probable cause to believe that petitioner had committed any offense against the United States triable in the District Court for the Northern District of Ohio.

5. In holding that the ruling of the District Court for the Northern District of Ohio, that the indictment returned in said court was sufficient as a pleading, was binding on the court in the case at bar in determining a different issue, namely, the issue of the sufficiency of said indictment as evidence of probable cause, and compelled said last mentioned court to hold that said indictment in itself constituted probable cause for believing that petitioner had committed an offense against the United States triable in the Northern District of Ohio, and necessitated the removal of appellant, thus depriving appellant of his constitutional rights under Section 2, Article III of the Constitution of the United States, and the Sixth Amendment to said Constitution.

6. In not holding that the detention of the appellant by the United States marshal under the order of said Commissioner, committing petitioner to the custody of said marshal, was in violation of Section 2, Article III of the Constitution of the United States, and of the Sixth Amendment to said Constitution, for the reason that in said proceeding for removal said Commissioner refused to receive, excluded, struck out, and refused to consider, on the ground that it was defensive and not material, the testimony of the

witness Jasper Blackburn, shown on pages 19 to 36, inclusive, of the record, and the testimony of the witness Joseph A. Scott, shown on pages 37 to 41, inclusive, of the record, said witnesses and their said testimony having been tendered on behalf of appellant to show that they had been actively and vigorously solicited for their business by active and aggressive competitors, co-defendants of appellant; said testimony so excluded and each of said witnesses being competent and material to show and prove that there was no probable cause for believing that said appellant was guilty of the offense charged in said complaint for removal, or any offense against the United States within the Northern District of Ohio and triable in the District Court for said district; the motions to strike said testimony being shown on pages 36 to 41 of the record and the order of the Commissioner striking out said testimony and refusing to consider the same, to which order the appellant at the time duly excepted, being shown on page 46 of the transcript in the following language:

> "In the light of the foregoing, it is my opinion that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible, and the motion to strike such evidence as has already been heard of a defensive nature, made by counsel for the Government, is sustained."

7. In not holding that the detention of the appellant by said United States marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, and of the Sixth Amendment to said Constitution, for the reason that in said proceeding for removal said Commissioner

refused to receive and consider the testimony covered by the offer made by the appellant shown on pages 49-50 of the record in the following language:

> "that during said period (meaning from January 1, 1917, to March 27, 1924) the said company has acquired all of its customers in the ordinary course of competitive trade, that such customers as it has retained during said period it has retained by means of fair prices and satisfactory service and not by any agreement or understanding with any person or corporation or association as to prices or terms or conditions of sale except the agreement between the particular customer and said company, and that such customers as it has lost have been lost in the ordinary course of competitive trade and have not been assigned or allotted by said company or by the defendant or by any other person, corporation or association."

to which objection was made by the United States and sustained by the Commissioner in the following language shown on page 55 of the transcript:

> "I think that all that evidence would be strictly defensive. The objection will be sustained to that."

to which ruling the appellant at the time duly excepted, and by which ruling the said Commissioner denied the appellant the right, to which he was entitled under the above mentioned provisions of the Constitution, to show that there was no probable cause for believing that he was guilty of the offense charged in said complaint for removal or of any offense against the United States within the Northern District of Ohio, triable in the District Court for said district.

8. In not holding that the detention of the appellant by the United States marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States and of the Sixth Amendment to said Constitution, for the reason that in said proceeding for removal said Commissioner refused to receive the testimony covered by the offer of the appellant shown on page 57 of the record in the following language:

> "Defendant offers Exhibit D-7, (As appears on page 48 of the record, this was a list of the customers of Iowa Malleable Iron Company, with which company appellant was affiliated) and D-8 in Evidence. * * * The defendant offers to show that the corporations or companies named in defendant's Exhibit D-8 were, under the first heading, obtained since 1918, and under,—that those under the second heading were lost since 1919."

to which objection was made by the United States and sustained by the Commissioner in the following language shown on page 57 of the transcript:

> "The Court: The objection will be sustained.
>
> Mr. Ross: Does the Court sustain it on the ground of incompetence?
>
> The Commissioner: Well, I don't see that it is material to the issue here, and it is irrelevant.
>
> Mr. Ross: Well, it probably isn't competent under our rule. We can supply the competency by Mr. Hughes' own personal knowledge, and I would like to have the record so show. Of course that memorandum there probably isn't competent now.

> The Commissioner: Well, I am satisfied so far as Mr. Hughes is concerned, of his personal knowledge, so far as that is concerned.
>
> Mr. Ross: But I would like to have the record show that it isn't sustained on the ground of incompetence.
>
> The Commissioner: Well, it is sustained on the ground that it is purely defensive matter and doesn't rebut the question of probable cause.
>
> All of which was duly excepted to."

which said offer of testimony was made by appellant for the purpose of showing that there was active competition for the customers of the company with which appellant was affiliated, many of which were acquired or lost during the period covered by the indictment, and that those so acquired or lost were in no way allotted or assigned, and as evidence showing that there was no probable cause for believing that appellant was guilty of the offense purported to be charged in said complaint for removal or of any offense against the United States within the Northern District of Ohio, triable in the District Court for said district.

9. In not holding that the detention of the appellant by said United States marshal under the order of said Commissioner, as aforesaid, was in violation of Section 2, Article III of the Constitution of the United States, and of the Sixth Amendment to said Constitution, for the reason that in the proceeding for removal before said Commissioner, said Commissioner refused to receive the testimony covered by the offer of appellant shown on page 71 of the transcript as follows:

> "Now, if your Honor would be willing to follow this further and let us bring in customer witnesses, perhaps in the light of what you have learned about the business this afternoon you would be willing to reconsider that decision and allow us to follow the thing further."

and to which offer the Commissioner ruled as follows:

> "I don't see where that would be material. I think that would be purely defensive."

to which ruling the petitioner at the time duly excepted, said offer having been made for the purpose of showing by competent witnesses present at the hearing that there was active and aggressive competition for the customers of the company with which appellant was affiliated, carried on by appellant's codefendants during the three-year period immediately preceding the finding of the indictment, as competent, material evidence showing that there was no probable cause for believing that appellant was guilty of the offense purported to be charged in said complaint for removal or any offense against the United States within the Northern District of Ohio, triable in the District Court of said district.

10. In not holding that the detention of the appellant by said United States marshal under the order of said Commissioner, as aforesaid, was without due process of law and in violation of the Fifth Amendment to the Constitution of the United States, for the reason that the petitioner was denied full opportunity to be heard upon the issue of probable cause.

Summary of Argument.

The appellant's contention is that the District Court erred in holding that the indictment was conclusive of the Government's right to an order of removal and in wholly disregarding the evidence before the Commissioner showing a want of probable cause to believe appellant guilty of any offense.

The indictment made only a prima facie case of probable cause and the appellant had a constitutional right to rebut this case by evidence. It follows that if his evidence did fully meet the case made by the indictment, the Commissioner had no power or authority to commit him, and he was entitled under the Constitution to his discharge in *habeas corpus* proceedings.

The evidence in behalf of the appellant showed conclusively that the only combination to which appellant was a party was a trade association and that the practices of this association were lawful and proper under the recent decisions of this court, and it specifically met and overcame the charges of price fixing and allocation of customers contained in the indictment.

ARGUMENT.

I.

The District Court erred in its decision as to the nature and scope of the issue in removal proceedings, in holding that the indictment and proof of appellant's identity established the Government's right to an order of removal, and wholly disregarding the evidence showing want of probable cause introduced before the Commissioner, and in so doing the Court denied the appellant's constitutional right to a proper hearing on the issue of probable cause.

Upon this question the District Court expressed its view in the following language (R. 73-74):

> "When we compare and analyze all the authorities submitted in the very complete briefs of counsel, the only real question in this case is the sufficiency of the indictment.
>
> "If the indictment is sufficient and the identity of the defendant is admitted or proven, a complete case for removal is established.
>
> "Language is found in the cases which seem to indicate that the defendant is entitled to a hearing upon the merits of the question of guilt or innocence but this question was very definitely disposed of by the Circuit Court of Appeals in this Eighth Circuit in the recent case of *Looney* v. *Romero*, U. S. Marshal, 2 Fed. (2nd) 22, in which it is said:
>
> 'Position of the appellant at the hearing and his evidence was simply to the effect that he did not commit the crime; that of course is a matter to be tried out under the indictment.'
>
> "It is my duty to follow this last announcement of the Court of Appeals of this Circuit."

We submit that in taking this position, the District Court brought itself into irreconcilable conflict with the decision of this Court in *Tinsley* v. *Treat*, 205 U. S. 20.

In that case, as in this, the Government sought to remove a defendant for trial upon an indictment under the Sherman Act, and rested its case wholly upon the indictment. The defendant offered to prove that he was not guilty of the acts charged in the indictment, the court excluded the evidence, and an order of removal was entered. The accused then obtained a writ of habeas corpus and the writ was discharged by the District Court.

On appeal this Court reversed the judgment discharging the writ and remanded the case with a direction to discharge the accused. The Court held that under the Constitution a person could not be removed from one district to another for trial upon a criminal charge until there had been a judicial determination in the district in which he was found that there was probable cause to believe him guilty of an offense lawfully triable in the district to which it was sought to remove him; that an indictment returned in the latter district was *prima facie* evidence of probable cause, but only *prima facie* evidence, and that the accused was entitled, in the proceeding for his removal, to rebut the case made by the indictment by "evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that District." And the Court concluded its opinion with the following language:

> "Nor can the exclusion of the evidence offered be treated as a mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution."

And in *Harlan* v. *McGourin*, 218 U. S. 442, this Court said of the decision in *Tinsley* v. *Treat*,

> "It was held that while an indictment constitutes *prima facie* evidence of the offense, when the defendant offered to show that no offense had been committed triable in the district to which removal was sought, the exclusion of such evidence was not mere error, but a denial of a right secured under the Federal Constitution to be tried in the State and District where the alleged offense was committed and therefore reviewable under *habeas corpus* proceedings."

This rule has never been repudiated or modified by this Court, and it manifestly renders the position taken by the District Court that the indictment was conclusive of the right of the Government to an order of removal untenable.

II.

If the evidence on behalf of appellant demonstrated the lack of probable cause, the Commissioner had no power or authority to commit him, and he was entitled as a matter of constitutional right to his discharge in habeas corpus proceedings.

We fully appreciate that the writ of *habeas corpus* cannot be used to correct mere error on the part of an examining magistrate. But if, as this Court held in *Tinsley* v. *Treat*, the accused in a removal proceeding has a constitutional right to introduce evidence to rebut the *prima facie* case made by the indictment, it necessarily follows that when he has introduced evidence which fully meets that

case, and which is neither discredited nor contradicted by evidence on behalf of the Government, he has a constitutional right to be discharged.

To hold that evidence in rebuttal of the case made by the indictment may be arbitrarily disregarded, no matter how clear and convincing it may be, and that the accused person in such a case has no remedy by *habeas corpus* proceedings, would be to authorize the removing tribunal to treat the indictment as conclusive evidence of probable cause, and destroy the rule established by this Court in *Tinsley* v. *Treat*.

We therefore insist that the District Court was bound to consider the evidence introduced by appellant to rebut the charges made by the indictment, and if, as we contend and propose to show, that evidence established appellant's innocence of those charges, he was entitled to his discharge.

III.

The evidence on behalf of appellant fully met the case made by the indictment and demonstrated that there was no probable cause to believe him guilty of any violation of the Sherman Act.

The question which first presents itself in this connection is the character of the *prima facie* case with which the appellant was confronted. This question received no consideration in the District Court, which held that it was precluded from any discussion of the indictment by reason of the fact that the Court in which it was returned had held it sufficient as against a demurrer filed by defendants who were not contesting removal (R. 75).

Without pressing the question whether the attitude was justified in a proceeding which presented the issue whether the Court which had ruled on the demurrer had jurisdiction to decide anything with reference to the appellant, we submit that the appellant's evidence in rebuttal of the indictment cannot be dealt with properly until the case made by the indictment has been appraised. And we believe that no case more tenuous has ever been put forward by the Government as a basis for removal.

Apart from a formal charge that all the defendants named in the indictment have violated the Sherman Act which follows the language of the statute, and cannot possibly be held to state any specific offense which would justify a prosecution, the indictment merely states that the corporations named as defendants have carried on their interstate trade pursuant to an agreement to eliminate competition, have by agreement "from time to time" fixed excessive and non-competitive prices for malleable iron castings and quoted and sold castings at such prices, and have "assigned and allotted their customers to one another" and enforced such allotments by refraining from competing for such customers" (R. 14).

This court has held in *Weeds, Inc.*, v. *United States*, 255 U. S. 109, that the word "excessive" as applied to prices has no proper place in a penal proceeding, and it has also held in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, that the fixing of non-competitive prices does not necessarily constitute a violation of the Sherman Act.

As to the charge that the corporate defendants allotted and assigned customers to one another, it is to be observed that the indictment does not even allege that this was done by agreement and is apparently based on the view that

the Sherman Act imposes a duty to compete—a theory which this court has definitely repudiated.

Swift & Company v. *United States*, 196 U. S., 375, 400.
United States v. *Reading Company*, 226 U. S., 324, 326, 369-370.

The appellant and the other natural persons named in the indictment are not charged with having authorized or done any act claimed to be illegal but merely with having been officers or agents of the defendant corporations.

The only basis for the jurisdiction of the District Court for the Northern District of Ohio to which removal is sought, is the charge that the corporate defendants were members of an association with headquarters at Cleveland in that district, and while it is alleged that the association was an instrumentality of the supposed combination, there is no statement of what it did in pursuance thereof or indeed that it did anything.

This, we submit, is a slender thread with which to draw defendants from all parts of the country to a long and burdensome criminal trial at Cleveland, and in the case of this appellant we believe it has been definitely broken by the evidence introduced before the Commissioner.

The appellant was Secretary, Treasurer and General Manager of the Iowa Malleable Iron Company, and in general charge of its business during the greater part of the period covered by the indictment, and he had been connected with it for many years prior to that period (R. 42).

With reference to the charges made in the indictment he testified as follows (R. 55-56):

"Q. Mr. Hughes, during the period covered by the indictment, from January 1, 1917, to March 27, 1924, have you or the Iowa Malleable Iron Company ever entered into any understanding, agreement or combination with any person or corporation named in the indictment to eliminate competition as to prices, terms and conditions of sale, or as to customers?

A. No, sir.

Q. Have you or your Company carried on trade or business in malleable iron castings under or pursuant to any such agreement or understanding?

A. No, sir.

Q. Have you or your Company fixed or quoted excessive or non-competitive prices?

A. No, sir.

Q. Have you or your Company during said period engaged in any combination in restraint of interstate trade and commerce in malleable iron castings?

A. No, sir.

Q. Or fixed excessive and non-competitive prices for malleable iron castings or quoted prices or made sales of such castings at prices so fixed?

A. No, sir.

Q. Have you or your Company ever assigned or allotted customers to be held as the exclusive customers of any person or corporation?

Mr. Wilson: I object to that question for the reason it is in defense and not in rebuttal of probable cause and move that all previous testimony along this line that has been had since the recess be so stricken for this same reason, incompetent, irrelevant and immaterial.

The Commissioner: The evidence may stand as to his having any agreement or working under any agreement.

The question was read by the reporter.

A. No, sir.

Q. Or enforced such assignments by refraining, directly or indirectly, from competing for customers so assigned?

A. There are no assignments."

As to the question of prices appellant testified as follows (R. 47):

"Q. Mr. Hughes, how have you determined what prices to charge your customers?

Mr. Wilson: I object to that as calling for the conclusion of the witness.

The Commissioner: Overruled. He has testified that he is manager and secretary of the Iowa Malleable Iron Company. I suppose that is the company you refer to, how they fix their prices.

Mr. Price: Yes.

A. Our sale prices have been based upon our actual cost of accounting records and based according to our actual experience of the cost of producing our work, or if it is new work on the cost established on that work after the submission of proper information regarding the character of the work and the condition of the pattern equipment and tonnage involved, and then our prices are made or established on what we consider as our legitimate margin of profit, which is added to the either actual or market conditions, the cost affecting that particular work.

Q. Do you have written contracts with your customers?

A. The last written contracts that we had expired in 1919, or possibly the early part of 1920.

Q. And what is your practice now with regard to filling orders from your customers?

A. With very few exceptions every price or agreement that we have with a customer is subject to change at any time in accordance with the—any change in the actual or market cost conditions. There are some few customers who insist on quarterly definite statement of price.

Q. Has any individual or corporation or association ever suggested to you or your company that your price in a given instance should be raised?

A. No, sir, they have not.

Q. Have those persons referred to, persons and corporation, ever requested you in any way to refrain from lowering any price for malleable iron castings?

A. You mean any—any person or corporation?

Q. Yes.

A. No, sir.

Q. Or Association?

A. No, sir, I never had it suggested.

Q. Or any member of any association?

A. No, sir."

The appellant also testified as fully as the Commissioner would permit upon the question of the relations of the Iowa Malleable Iron Company with its customers. A list of the Company's customers were produced and counsel for appellant proposed to interrogate appellant as to the method by which the company obtained each one, and how it kept its business or lost it as the case might be (R. 48, 50). The Commissioner refused to permit this line of examination on the ground that it would be proper only upon the trial in the court where the indictment was found (R. 50, 56-57).

The appellant was, however, permitted to testify generally as to this list of customers as follows (R. 56-57):

"Q. With regard to the list of customers, defendant's Exhibit D-7, containing about 178 customers, will you state whether you acquired all of those customers in the ordinary course of competitive trade?

A. We did.

Mr. Wilson: The same objections as heretofore.

The Commissioner: Overruled.

Q. State whether or not as to such of those customers as your Company has retained during the period covered by the indictment, whether it has retained those customers by means of any agreement or understanding with any other person or corporation or association as to prices or terms or conditions of sale or allotment of customers.

A. No, sir, they have not been retained by any agreement, or in any way aside from the actual business transactions with those customers themselves.

Q. If you know how did you retain those customers during that period?

A. By reason of fair business dealing and fair prices and fair consideration, and the quality of the material and the personal service granted to those customers.

Q. What elements enter into the service rendered by a manufacturer of malleable iron castings?

Mr. Wilson: I object to that as immaterial.

The Commissioner: Sustained.

(Exception.)

Mr. Price: If your Honor please, we desire to show that the price of malleable iron castings is not alone important, but just as important as the matter of price is the matter of service, and par-

ticularly the quality of the castings; that it is not like a standard product, such as lumber, or steel rails, but each casting differs from every other casting.

The Commissioner: I think that would be immaterial under the charge in the indictment. Objection sustained.

(Exception.)

Q. Will you state whether any customers that you may have lost in the period covered by the indictment were assigned to any other manufacturer, allotted or assigned?

A. I never had any such knowledge.

Q. How do you account for their leaving you?

A. On account of directly competitive conditions.

Q. What enters into those competitive conditions?

A. The matter of price, the matter of delivery, the matter of quality possibly for a certain class of work."

As to the Iowa Company's methods of getting business, his testimony was the following (R. 53-54):

"Q. Have you sent out to consumers of malleable products any advertising letters or circular letters?

A. Nothing more than——

Q. Soliciting their trade?

A. Nothing except personal letters.

Q. State whether or not you have—that has been a practice of the Iowa Malleable Castings Company to solicit trade generally in that manner.

A. Yes, sir, we have.

Q. Have you done it during the three years ending March 27, 1924?

A. Yes, sir.

Q. Well, state how frequently you have sent out such letters.

Mr. Wilson: I object to that as immaterial and not rebuttal of probable cause.

The Court: Well, he may answer.

A. What was the question?

The question was read by the reporter.

A. That depends on business conditions. But we usually send out inquiries of that kind, soliciting work from the users of malleable when the business conditions are at a low ebb.

Q. Did you communicate with the Association or with any member of the Association before sending out such letters as to whether it was proper for you to send out letters to the given consumers?

A. No, sir. I consider it my right to solicit business where I please.

Q. Where did you get the list to which you addressed such letters?

A. From our records that we have kept up for a great many years as to the users of malleable.

Q. How many years?

A. Oh, ten or twelve years at least; twenty years possibly.

Q. Has any member of the Association or any individual representing a member of the Association or the Association ever requested you not to solicit the trade of a given consumer of malleable iron?

A. No, sir.

Q. Of malleable iron castings?

A. No, sir.

Q. Have you ever requested any individual or any corporation to refrain from soliciting one of your customers?

A. No, sir, I never did.

Q. When you received an inquiry from a consumer of malleable iron castings state just what you did before you quoted him, what information you generally obtained.

Mr. Wilson: I object to that question as—and all other questions along this line as being immaterial, irrelevant and incompetent, being evidence purely in defense and not in rebuttal of probable cause, and inadmissible for that reason and for each and all the reasons stated.

The Commissioner: I think that would be defensive matter. Objection sustained.

(Exception.)

Q. Mr. Hughes, have you at times declined to quote when you have received inquiries from customers—from customers of malleable iron castings?

Mr. Wilson: The same objections heretofore made.

The Commissioner: I don't see where that is material. Objection sustained.

(Exception.)

Q. State whether or not you have supplied castings to the American Car Company.

A. Yes, sir, we have.

Mr. Wilson: I object to that for the reasons heretofore made, immaterial, not in rebuttal of probable cause.

The Commissioner: I think all that evidence would be strictly defensive. The objection will be sustained to that.

(Exception.)"

Although the indictment did not charge that the Association was an illegal combination, or indeed relate the Association to the supposed combination at all except by alleging that the corporate defendants "required" it to collect and distribute certain information, without stating that it ever complied with this requirement, it became evi-

dent upon appellant's cross-examination that the Government's case rested in reality upon the participation of the appellant in the activities of the Association. The appellant's testimony upon this point is of vital significance, and we take the liberty therefore of giving it substantially in full (R. 50-53).

"Q. When did the Iowa Malleable Iron Company join the American Malleable Castings Association?

A. It was—either in 1914 or 15; I am not positive.

Q. Do you know at whose suggestion your Company joined that Association?

A. I made a suggestion to Mr. Spaulding, who was then Manager of the Company.

Q. And were you at that time an officer of the Company?

A. I was, yes.

Q. What was the object in joining this Association?

A. To get the benefit of the research and laboratory experience and the program of technical work that the Association were putting on then and contemplated carrying on to a greater degree in the future years. We were producing at that time a very inferior product.

Q. Is that true of the malleable iron industry generally or were you speaking of your own Company?

A. I was talking about our own concern.

Q. Well, do you know about the condition of the malleable iron castings produced by other companies as well as your own, speaking very generally?

A. Very generally only. I know that there was a great deal of diff ence in different companies as to the quality of the product; sometimes you would get good material and other times you would not.

Q. Were your Company and other malleable companies experiencing any competition from other castings—from manufacturers of other than malleable iron castings at that time?

A. Yes, sir. We have always experienced that competition.

Q. From what sort of manufacturers?

A. Well, manufacturers of gray iron, or semi-steel, or steel.

Q. And state what was done by the Association at that time along the line of this research work? State as briefly as possible.

A. I know at the time we joined the Association of the specifications for physical requirements of samples, as set down by the American Society for Testing Materials, and that was 35,000 pounds tensile strength per square inch with an elongation of five per cent in two inches. At the present time those specifications are 50,000 pounds tensile strength per square inch with a ten per cent elongation in two inches, which very nearly approaches certain classes of steel castings in strength.

Q. During that time did the Association maintain laboratories and its own chemist?

A. Yes, sir.

Q. Whereabouts?

A. At Albany, New York.

Q. And what was each member of the Association required to do or to send to that laboratory?

A. We were required to send to the consulting engineer of the Association some one test bar from some one heat each day, each working day; that is, a standard test bar of the American Society for Testing Materials.

Q. State whether or not your Company did that during the period from January 1, 1917, to March 27, 1924, the date of the indictment.

A. I don't remember exactly when they started that system of sending in bars, but we have ever since it has been in existence.

Q. Who is the chemist who has been employed by the American Malleable Castings Association?

A. Enrique Touceda.

Q. Spell it.

A. E-n-r-i-q-u-e T-o-u-c-e-d-a.

Q. State whether or not he and his assistants have any system for inspecting plants of members of the Association.

A. Yes, sir, they do.

Q. What system have they?

A. Well, they have these test bars and the requirements are that the—that at least ninety per cent of all your bars must stand up physically under the requirements of the Association each three months or you are not considered a producer of first class malleable iron; and, furthermore, there is an inspector at the present time, for instance, comes around at our plant every three weeks and inspects our product to see if the castings that we are producing conform with the quality of material and the physical requirements of the test bars that we submit to the Association engineer. He makes a report, a copy of which goes to the consulting engineer for —of the Association, and a copy of which I get, with such comments as he cares to make on his findings. And he also picks up at random any castings that he sees fit or any other test bars which are also tested for a check against our work.

Q. What is given to a member whose tests—whose test bars meet the tests of this Association, what certificate or——

A. A certificate as to quality, stating that they come within the requirements of the Association and are considered a producer of what they term certified malleable iron castings.

Q. What, if any, other activities, co-operative research activities, are carried on by the Association, in respect, for example, to shop practice, shop safety?

A. They carry on very exhaustive research work with reference to even molding sands and different classes of fire brick and packing materials, the construction of annealing ovens, the operation and construction of the melting furnaces. We so happen to have in our own plant, our own metallurgist is a member of the shop practice committee of the Association of fifteen that handle all these questions. He is on the committee of annealing.

Q. Have you a laboratory of your own at your plant?

A. Yes, sir.

Q. How long have you maintained that laboratory?

A. Since 1920.

Q. Did your experience with the research work of the Association have any bearing upon your starting your own laboratory?

A. Yes, sir, it did.

Q. What?

A. We found out we couldn't make the uniform product without more technical metallurgical and chemical knowledge as to the character of the materials and class of material that we wanted to turn out. We couldn't even keep up with the requirements of the Association without more technical knowledge. And we sent a man to school for nine months, at our own expense, to become a metallurgical engineer.

Q. Did you have any other object in joining the Malleable Castings Association, other than you have indicated just now?

A. That was our sole object, was to get the benefit of the co-operative research work.

Q. Have you ever been an officer of the American Malleable Castings Association?

A. No, sir, I have not.

Q. Or held any position with the Association?

A. Not other than a member.

Q. Have you attended meetings of the Association?

A. I attend the meetings in Chicago when they are held there quite regularly.

Q. Was the matter of prices, or terms, or conditions of sale, or allocation of customers ever discussed at any meeting of the Association which you attended?

A. No, sir, never was.

Q. Did you ever discuss such matters with members of the Association?

A. I might in a casual conversation regarding market conditions in different parts of the country.

Q. Did you ever discuss with members the allocation or assignment of customers generally, or any particular customer?

A. No, sir, I never did.

Q. Did you ever discuss with any officer of the Association or any member of the Association the matter of fixing prices?

A. No, sir, except at the instigation of the War Industries Board.

Q. Well, tell about that.

Mr. Wilson: What was that answer?

A. At the instigation of the War Industries Board, in 1918.

Mr. Wilson: I object to that, six years before the finding of this indictment, being immaterial to any issue here.

The Commissioner: Sustained.

(Exception.)

Q. When you attended these meetings of the Association state whether or not you made efforts to find out market conditions.

A. Regarding—regarding what, do you mean?

Q. Market conditions in your industry.

A. Yes.

Q. Did you do that aside from any conversations with members of the Association?

A. If I wanted any information regarding—probably concerning market conditions as to various classes of castings, any casual conversation of that kind would be held as an individual.

Q. But you stated that you attended these meetings in Chicago as I understand it.

A. Yes, sir."

It also appeared that the Association maintained an information service through which members could obtain certain information as to purchasers of malleable iron. The appellant's company filed with the Secretary of the Association twice a year a list of the customers it had served during the preceding six months, and upon inquiry of the Secretary as to any particular purchaser it could ascertain what other member, if any, had included his name in a similar list. To some extent members also reported to the Association the orders they had taken and the prices at which they had taken them and this information was available to members who made inquiries (R. 67-68).

As to this information service, appellant testified (R. 62-71):

"Q. What information did you endeavor to obtain before you made any work for a consumer of malleable iron castings?

Mr. Wilson: I want that connected with this Association. You say what information. Now you mean from the Association?

Mr. Price: I will come to that, but I think this is a proper question at this time.

Mr. Wilson: I object to this question as immaterial under the issues.

The Commissioner: Overruled at this time.

A. Every casting has its own conditions and its own cost. It is utterly impossible to quote on any man's work, I don't care what he makes, unless you have absolute and accurate knowledge as to the different needs—the different things relating to that work. You must know conditions, as to his pattern equipment and the condition of it and the character of his castings.

Q. All patterns are not the same then?

A. No, indeed.

Q. Is there such a thing as a standard casting?

A. Yes, there is in certain classes of work. Railroad work, for instance, has certain standard parts.

Q. What work?

A. Railroad work.

Q. Do you do much railroad work?

A. Oh, very little.

Q. Well, in castings which you manufacture you may state whether or not there is a variety of those castings or whether they differ each from the other.

A. Each and every casting has its own cost.

Q. Well, do the patterns which you receive from the consumers differ as to quality of the patterns, some being in good condition and some in bad?

A. Yes.

Q. And are some of the castings which you manufacture intricate castings, of intricate design and difficult to manufacture?

A. Yes, they are.

Q. What information along that line is it necessary for a manufacturer of castings to know before he undertakes to turn out castings for a customer?

A. It is necessary to know the condition of the pattern equipment, as I said a while ago, and the general character of that casting, in order to form your cost. One casting weighing one pound might cost one figure, and another casting weighing one pound might cost ten times as much, depending on the character of that casting and the condition of the pattern equipment from which it is to be made.

Q. Did you endeavor to find out whether castings for which you received an order had been difficult for some other producer of malleable castings to manufacture?

A. Yes.

Q. And how would you find out? How would you obtain such information?

A. We might get that information from the former producer and also if it was work of a class that we were not equipped to handle. Another reason to follow up an inquiry, it has never been our policy to take work that we didn't figure we could carry on for one particular customer as a steady customer.

Q. And could you obtain information along that line by communicating with the Association and finding out the former source of supply of a given consumer?

A. Yes, you could. You could get some information along that line. We did that in very, very few instances.

Q. Well, tell just what you did in those few instances where you did get information from the Association. What did you do in the way of following that up?

A. If the work was of a character that we could handle it and it was in our line, with the pattern

equipment proper, we considered it our perfect right to quote; we didn't care where that customer was located. If they were a concern that were using castings that were not in our line, or automobile work, for instance—we don't get in any automobile work except accessory work; never get in any of it; not equipped to handle it—or if they were customers so situated geographically as you might get a spasmodic order from at one time and never get them again, you can't make anything that way, from customers of that kind; you can't make money on a single order of a concern, so much preliminary cost to getting ready to produce a firm's work.

Q. State whether or not some producers of malleable iron castings specialize in light castings and others in heavy castings.

Mr. Wilson: I object to that as immaterial, incompetent and irrelevant.

——And in which of those categories your Company is.

Mr. Wilson: The same objection.

The Commissioner: Overruled.

(Exception.)

A. There is a very decided difference in the character of work required by users of malleable castings. We make—specialize on light work.

Q. Your Company?

A. Yes.

Q. If you found out that a consumer who had sent you an inquiry had just been receiving its castings from a manufacturer of castings whom you knew supplied only heavy castings would that have any bearing upon whether or not you went after that trade?

Mr. Wilson: I object to that as very leading and suggestive.

The Commissioner: Sustained.

(Exception.)

Q. Can you give some illustrative example, if any occurs to you, how by finding out the manufacturer of malleable castings who had immediately previous to the receipt of your inquiry been supplying the concern determined whether you would solicit that business?

A. I don't recall any. There are very few inquiries that we have made of that character.

Q. And state whether or not in the majority of instances you made inquiry of the American Malleable Castings Association regarding the respective consumer.

A. No, we don't in the majority of cases; not near.

Q. Well, can you approximate the percentage of cases in which you did make such inquiry of the Association?

A. I couldn't answer that in any degree of accuracy, but I wouldn't consider it over ten per cent.

Mr. Price: You may cross examine.

By Mr. Wilson:

Q. Now in regard to the money you sent this Association, was it 25c a ton that you testified to here as sending them—is that all the money that you ever sent them?

A. No, sir.

Q. What other money did you send them?

A. We sent our annual dues of $120.00 a year.

Q. $120.00 a year. Now the annual dues and this 25c a ton, did that constitute all the money you sent?

A. As far as I know, unless they were undertaking some special technical work that required extra funds to carry that work on.

Q. Did you pay anything extra for this information service?

A. No, sir.

Q. Would that come in the $120.00 a year annual dues?

A. I don't know where it came in. I didn't handle the benefits of the Association.

Q. Did you have any by-laws or anything like that in this Association?

A. Yes, sir.

Q. Was it incorporated, or just an association unincorporated?

A. I couldn't say.

Q. Did you ever read their by-laws?

A. I don't believe I ever did.

Q. Does your Company have a copy of them?

A. I do not know whether they do or not.

Q. Who receives the mail for your Company?

A. Two or three different employes.

Q. Who receives the telegrams and things of that kind?

A. The telephone operator.

Q. You don't want to testify here that you examine all the mail that comes to this Company, do you?

A. No, sir, I do not.

Q. Or all the telegrams or all the telephone calls?

A. Not all of them, no.

Q. And if there were letters that came to your Company quoting prices that you should submit, or territory which might be allocated, or customers which might be given to you—such a letter might come to your Company and you never see it, mightn't it?

A. If any such letter ever come to my Company I would know it.

Q. What do you base that on?

A. My instructions to our office employes.

Q. To bring such a letter immediately to you?

A. Well, such letters that relate to customers or inquiries on prices to quote customers.

Q. You say you don't know anything about this information bureau that is maintained there, what its purpose was?

A. It is to get the—such information as they get in assisting the—the handling of business transactions legitimately.

Q. Well now just what was your understanding of the information they were to furnish you?

A. Information regarding the character of the concern's work, the condition of——

Q. You mean a prospective customer?

A. A prospective customer, yes, sir.

Q. The kind of castings they required?

A. The kind of castings they required.

Q. Is that all the information that you understood they were to send you?

A. And the condition of their—well, they don't know the character of castings, the Association don't.

Q. Well, I don't understand what information you thought you were to get from this bureau.

A. All the information we ever got was as to who produced that work, or who had produced it.

Q. What work do you mean, Mr. Hughes?

A. The work of any particular concern—who were producing the work of any particular concern.

Q. I am pretty dense, I guess, for I don't understand what you mean.

Mr. Price: State how, after you got the information from the bureau as to the former source of supply, you would obtain information; would you obtain—go back to the Association and ask them for the information you wanted?

A. No. If we got an inquiry from a concern and I wanted some more information regarding that concern, or the work of that concern——

Mr. Wilson: That is, the kind of material or product they turned out?

A. Yes. And I could ask the Association for who was making that work, or who had listed them as a customer. I could use my own judgment, if I wanted to go any further, and ask the concern who had been making it, for further information if I so desired. But I considered it my perfect right and privilege to quote it direct without getting any more information if I could get that information.

Q. Now what other information did you receive from this Company besides that?

A. I received the information as to prices of business closed.

Q. What is that?

A. The prices of the business that was closed.

Q. What do you mean by that?

A. The price of any contract that might be let that was already let.

Q. That is, what some other company had agreed to furnish——

A. No, sir, not what they had agreed to; what they had already entered into contract to furnish.

Q. Entered into contract to furnish. You got that information?

A. You could if you so desired.

Q. What did you use that information for?

A. That would be in response to an inquiry. You could use that information if you lost a customer.

Q. Well, how did you use it?

A. Give you the information how much the other fellow beat your price if he got the business.

Q. And the next time why you could——

A. I could beat his.

Q. You could beat his the next time.

A. If I could do it consistently and according to good business judgment.

Q. And that was the reason, the sole reason, for sending in those closed contracts was it, to this Association?

A. So far as I know.

Q. Did your Company send in closed contracts of that kind so another firm could beat you if he could beat you the next time?

A. We send in closed contract prices, yes, sir.

Q. And you were willing to do that, knowing that somebody else was going to use that to beat your price?

A. Not necessarily knowing that. That would be up to them.

Q. You sent it in there for that sole purpose?

A. No, not for that sole purpose.

Q. What other purpose?

A. Covering business closed.

Q. Well, why would the Association care about your business closed?

A. That would give some information as to the general trend, possibly, of prices, general market conditions.

Q. That was the sole reason you sent it in, was to let them know what you were furnishing stuff for?

A. So far as I know, yes, sir.

Q. That wasn't your idea at all was it Mr. Hughes? Wasn't it sent in there for the reason to show that the various members of this Association were living up to their agreements?

A. No, sir, it was not.

Q. Now you had listed with this Association all the customers you furnished; didn't you?

A. No.

Q. You didn't list them that way?

A. Listed them covering a certain period.

Q. Well now supposing your fiscal year—did you list all the customers you furnished for that year?

A. We listed in September all the concerns for whom we had made castings the previous six months.

Q. That was with the Association; you sent in the list?

A. Yes.

Q. And what was the idea of sending in that list?

A. To give other concerns the benefit of inquiry if they cared to make inquiry regarding the character of that concern's work or any one of those concerns' work.

Q. So they could write to you and find out what you were making for them?

A. No, sir. So they could get information regarding pattern equipment and the character of the work.

Q. And how much you were furnishing them for?

A. No, sir.

Q. Nobody ever wrote you and asked you how much you were furnishing a certain contract for?

A. Not except—unless the contract had been closed, and wanted to know if we got the business.

Q. They wouldn't need to write you direct for that would they? They could get it from the Association?

A. They could get it from the Association.

Q. And every member of this Association had every closed contract that they made in a certain period in that Association?

A. I don't know about anybody else. We didn't have half of ours in there.

Q. Just on your allocated territory, that is where you had——

A. Didn't have any allocated territory.

Q. How much did you pay Belt, do you know?

A. I don't know.

Q. What was the reason the metallurgical bureau was located at Albany, New York, and your information bureau at Cleveland, Ohio?

A. That is something beyond my knowledge, except that this man, Touceda, was hired and that is where he conducts his laboratory.

Q. But your information bureau was at Cleveland, Ohio, wasn't it?

A. Yes, sir.

Q. Did you ever communicate with the Association at Cleveland, Ohio, as to whom a certain customer had been assigned?

A. No, sir.

Q. Did your Company ever communicate with that Association, at Cleveland, Ohio, as to whom a certain customer had been assigned?

A. No, sir.

Q. Nobody in your Company or nobody that ever had any connection with your Company ever communicated along that line?

A. Not to my knowledge.

Q. Well, if they did would you have knowledge of it?

A. They wouldn't under my instructions.

Q. Well, if they did would you have knowledge of it?

A. I might not if some inferior officer would happen to write something.

Q. What I want to get at is this, suppose the Government now, Mr. Hughes, has in its possession a communication from your Company to this Association asking about certain customers and who they were assigned to; if the Government has such a communication as that would you know whether it had been sent or not?

A. I probably would.

Q. And now I want to ask you whether or not such a communication was ever sent by your Company?

A. No communication asking regarding the assignment of a customer. We might have asked who made the work of a particalar customer.

Q. But not anything about any assignment?

A. No, sir.

Q. Of prices, about prices of various articles?

A. Might have asked prices of business closed.

Q. Do you know how many members there are in this Association?

A. There are about sixty.

Q. Do you know the dues required from those various members?

A. The dues are $120.00 a year.

Q. Do all of those sixty members pay that?

A. I don't know.

Q. Did all of those sixty members pay 25¢ a ton on their tonnage?

A. I don't know.

Q. Do you know that only 47 of those 60 subscribed for this information service?

A. I don't know.

Q. You don't know that only a part of these members, who are members of this Association, malleable iron association, did not subscribe to this information bureau located at Cleveland, Ohio, do you?

A. I don't know what you mean by subscribed.

Q. Well, received the service.

A. No, I don't know a thing about anybody else's business.

Q. Were you ever an officer of this Association?

A. No, sir.

Q. Where did you send this $120.00 a year and $750.00?

A. To Cleveland.

Q. To Cleveland? And that $120.00 a year was for the service you received from Cleveland wasn't it?

A. For the service we received from Cleveland? That was for the clerical help and the executive work of the Association in the office there at Cleveland.

Q. You don't know whether these thirteen or fourteen members that didn't belong to that service of the Association sent that $120.00 in or not do you?

A. It is my understanding that everybody paid their dues.

Mr. Wilson: I believe that is all.

Examination. By the Commissioner:

Q. Mr. Hughes, there is just one question I would like to ask you. If you had some customer in mind, and say you wrote down to this Association, they would give you information as to the class of castings they were using and the pattern equipment?

A. No, no. They would give me the name of the concern, if any such concern listed that concern as a customer, so the information would be available if I cared to follow the inquiry further.

Q. That is, you would have to get the condition of their pattern equipment from the concern who had been making their castings? Is that it?

A. Yes, sir.

Re-direct examination by Mr. Price:

Q. It isn't only the condition of the pattern equipment, but the nature of the casting?

A. That is absolutely necessary. You can't cope with it without knowing the nature of the casting.

Q. Did the financial standing of the prospective customer have anything to do with it?

Q. Yes, the responsibility of the concern is the general inquiry you always make in any inquiry.

Q. Did you make inquiry as to the financial standing of these ten per cent—in the cases in which you made inquiry of the Association and got back word saying that such and such a manufacturer had been supplying, did you ask that manufacturer in many instances about the financial standing?

A. Yes, I did, if I did not already have that information.

Q. And their desirability as a customer, whether they were contentious or otherwise?

A. Yes, sir, that would have its bearing.

Q. Now, Mr. Hughes, in about what percentage of this business closed did you send in reports to the Association?

A. You mean in relation to the number of customers or tonnage or what?

Q. Yes, number of customers. What percentage of them did you send in reports to the Association of business closed?

A. I will have to guess at that somewhat, but it would not exceed twenty-five per cent.

Q. And your inquiries which you made of the Association were in only about ten per cent of the cases?

A. Yes, sir.

Q. Now this money that you sent to the Association, whatever it is, in the neighborhood of 25¢ a ton, was that to be used in defraying the expenses of the research work carried on by the Association?

A. Yes. That went to the jurisdiction of the research committee for advertising and conducting of the laboratory and for salaries of the metallurgical engineers and inspectors.

Q. Did you ever get from the Association any results of that research work?

A. Yes, sir.

Q. And state whether or not that was useful in your business and in enabling you to turn out satisfactory work for your customers?

A. It was very useful; technical papers covering different aspects in relation to the production of malleable iron castings and the preparation of the material, the matter of combustion, fuel oil, coke and coal, matters of annealing, the handling of annealing, annealing construction.

Q. Were those matters discussed at the meetings of the Association which you attended?

A. Yes, sir, very much in detail."

This is the appellant's evidence and we submit that in the absence of impeachment or contradiction, it effectively disposes of the vague and equivocal charges of unlawful agreements contained in the indictment. There is no ground for discrediting it. It was not a mere denial of guilt but affirmative testimony to facts inconsistent with the existence of guilt. In so far as it lacks circumstance and detail, the responsibility lies with the Government and the Commissioner and not with the appellant, who subjected himself to cross-examination and who was prevented from submitting to the Commissioner a complete and detailed history of the relations between his company and its customers only by the Government's objection and the Commissioner's ruling. In these circumstances, it is not for the Government to claim that the appellant's testimony that he had no part in any assignment of customers, or fixing of prices is not to be believed.

Nor is his testimony without corroboration. The fact that two customers of the Iowa Malleable Iron Company were produced and testified (R. 19-40) to urgent solicitation

for their business by defendants named in this indictment cannot be disregarded, even though that testimony was stricken out upon the Government's motion. This court has held in *United States* v. *United States Steel Corporation*, 251 U. S. 417, that customer witnesses who testified for a defendant in a case under the Sherman Act, must be assumed to represent the situation of customers generally unless the Government produces controverting evidence (251 U. S. 417, 448). And in this case the Government not only failed to produce evidence that any purchaser had been limited in his freedom to buy malleable castings where he saw fit to buy them, but it prevented the appellant from introducing evidence that purchasers did not find themselves so limited.

Indeed, both the Government and the Commissioner appear to have submitted to the view that the charges in the indictment that prices were fixed by agreement, and customers were actually allotted and assigned could not be supported, and to have taken the position that the case against the appellant rested upon his testimony as to the information service of the Association.

The Commissioner based his finding that there was an agreement in restraint of trade not upon the indictment but upon the indictment and the evidence of the appellant (R. 71), and there was no evidence of the appellant remotely tending to establish any agreement except an agreement to exchange information.

It is significant that this case was heard by the Commissioner and decided by the District Court before the decisions by this court in *Maple Flooring Manufacturer's Association* v. *United States*, 268 U. S. 563, and *Cement Protective*

Manufacturer's Association v. *United States,* 268 U. S. 588, were handed down, and while it was still the theory of the Department of Justice that the organized exchange of trade information among competitors might be held illegal, even though it was not charged or proved that such information was exchanged in furtherance of any concerted purpose "to restrain the freedom of action of those who buy and sell."

Upon that theory the Government and the Commissioner might have been justified in thinking that a violation of the Sherman Act had been shown by appellant's testimony that he participated in an information service which *might* have been used either for the allotment of customers or in furtherance of a policy of price-fixing, in spite of his denials that it was so used, and without any evidence to controvert those denials. But there is no longer any color for the view that business men may be indicted for participating in the systematic collection and distribution of information pertinent to their affairs, and legitimately useful, merely because it may be susceptible of improper uses, and we submit that an order of removal which is predicated on that view cannot be sustained.

There is certainly no other basis for the removal of appellant. It stands out clearly upon this record that the Government abandoned the charge of price-fixing and the allotment of customers made in the indictment. It could do nothing else in the face of appellant's uncontradicted and unimpeached testimony. There remains nothing except the fact that appellant's company was a member of a trade association which maintained a bureau of information and there is not a shred of evidence that appellant or

any one else ever made use of this bureau for any improper or unlawful purpose. We insist that upon such evidence the Commissioner had no power or authority to hold the appellant, that the District Court erred in refusing to discharge him from custody, and that the order appealed from should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 513

UNITED STATES OF AMERICA, ex. rel, W. V. HUGHES,
Appellant,

vs.

ROY B. GAULT, United States Marshal, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

REPLY BRIEF FOR APPELLANT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The brief for the Government in this case relies upon *Rodman* v. *Pothier,* 264 U. S. 399, as supporting the decisions of the Commissioner and the District Court. But *Rodman* v. *Pothier* held merely that disputed and doubtful questions should not be decided in removal proceedings, and counsel for the Government fail to point to the existence of any doubtful or dis-

puted question in the case at bar which would bring it within that rule.

They say, it is true, that the Commissioner "may" have entertained a doubt as to the legality of the conditions under which appellant was conducting his business (p. 35), but they do not undertake to show that there was anything in the record which could justify this hypothetical doubt. Upon their own statement of the evidence, it showed conclusively that the only combination between the defendants related to metallurgical research and the exchange of trade information, and repelled any inference of an agreement to use this information for unlawful purposes, and counsel for the Government do not intimate that any other construction can be placed on it.

We submit that any doubt which may have existed prior to the decisions in *Maple Flooring Manufacturers' Association* v. *United States,* 268 U. S. 563, and *Cement Manufacturers' Protective Association* v. *United States,* 268 U. S. 588, as to the legality of this situation, was effectively dispelled by those decisions.

The only doubtful question presented by the record is the question whether the indictment, which stated no facts showing jurisdiction in the Northern District of Ohio, and did not connect the appellant with any specific illegality, was sufficient to put appellant to his evidence. The position of the Government is that this doubt was conclusively determined against the appellant by the overruling of a demurrer filed in the trial court by other defendants, and that this indictment is a sufficient basis for an order of removal, even though every inference of illegality which can be drawn from it has been fully met by evidence in rebuttal.

Manifestly, if the judgment of the trial court is conclusive on the question of the sufficiency of the indictment to make out a case of probable cause, and if unimpeached and uncontradicted evidence in rebuttal of the indictment may be ignored by the removing tribunal, no matter how clear and convincing it is, on the theory that only the trial court can pass on it, there is nothing left upon which the removing tribunal can exercise any judicial discretion.

We respectfully insist that neither *Rodman* v. *Pothier* nor any other case decided by this court supports any such doctrine. Nor can it be contended that the appellant received the hearing to which he was entitled under the Constitution, merely because the Commissioner admitted evidence in rebuttal. To admit evidence and to place an interpretation upon it which it will not reasonably bear as the Commissioner did, or to ignore it as the District Court did, is to deny the constitutional right of the accused to rebut the case made by the indictment as effectually as it would be denied by excluding the evidence entirely.

The extradition cases cited by the Government are not in point. In *Charlton* v. *Kelly,* 229 U. S. 447, there was competent legal evidence produced to show the commission of the crime. The question arose as to the defense of insanity. This Court pointed out that by the law of New Jersey, the place where the fugitive was found and the law of which, under the extradition treaty, was to be invoked, "insanity as an excuse for crime is a defense and the burden of making it out is upon the defendant." So far as probable cause was concerned, and the case required to be made out by the treaty, there was abundant evidence.

In *Collins* v. *Loisel,* 259 U. S. 309, another extradi-

tion case, the court found that the evidence to support the charge of obtaining property by false pretenses was adequate. The court reviewed the evidence (p. 314) and said that it was clear that this evidence would justify a conviction not only for cheating, but also of obtaining property under false pretenses. Collins was allowed to testify to the things which might have explained ambiguities or doubtful evidence in the case made against him. "In other words," said this court, "he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense." This statement could not possibly be taken to mean that a defendant in a removal case could not show absence of probable cause and destroy the whole basis for the charge against him. In the cases cited by the Government this court was careful to point out that there was sufficient evidence to justify a finding of probable cause and on this ground alone was the dismissal of the writ of *habeas corpus* sustained.

In *Gayon* v. *McCarthy,* 252 U. S. 171, the court reviewed the evidence at length (pp. 173-178) and reached its decision in the case, which was one of *habeas corpus,* only on the ground that there was "*substantial evidence*" before the Commissioner showing probable cause.

This court has held (*Tinsley* v. *Treat,* 205 U. S. 20, and the cases following it) that while the indictment, if it is a valid and sufficient one on its face, may be regarded as enough to put the defendant to his proof, the defendant has a constitutional right to show the absence of probable cause. Of course, this constitutional right is a substantial one. It is not a matter of form. But of what consequence is the right, if the

defendant's evidence destroys the basis for a finding of probable cause and his evidence is ignored?

This Court has held in *habeas corpus* cases that the indictment is not conclusive, and that it is a denial of a constitutional right to regard it as conclusive. But to receive evidence which leaves no basis for a finding of probable cause and then to sustain the removal is to make the indictment conclusive. We submit that this is what the court below did.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 513

THE UNITED STATES OF AMERICA EX REL. W. V. HUGHES, APPELLANT

v.

ROY B. GAULT, UNITED STATES MARSHAL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

BRIEF ON BEHALF OF THE MARSHAL

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the District Court (not reported) is printed on pages 73–75 of the Record. An appeal by another defendant to the same indictment involving another point was disposed of in *United States ex rel. Rutz* v. *Levy,* 268 U. S. 390. A petition for *certiorari* by still another defendant to the same indictment was denied on October 19, 1925. (*Fitzgerald* v. *United States,* 6 Fed. (2) 156; *certiorari* denied, 46 Sup. Ct. Rep. 26.)

GROUNDS OF JURISDICTION

The judgment to be reviewed is that of the District Court for the Southern District of Iowa, dated April 29, 1925, appearing at R. 75.

The appeal is taken under Section 238 of the Judicial Code as it existed prior to the amendment of February 13, 1925. (Act of February 13, 1925, Ch. 229, 43 Stat. 936.)

STATEMENT

This is a direct appeal from an order of the District Court of the United States for the Southern District of Iowa discharging a writ of *habeas corpus* by which appellant sought to obtain a review of an order made by a United States Commissioner committing him to custody pending the issuance of an order of removal. The Government sought to remove him to the Northern District of Ohio for trial there under an indictment (R. 8–15) charging him and 46 other persons and 46 corporations with having engaged in a combination in restraint of interstate trade and commerce in malleable iron castings, in violation of Section 1 of the act of July 2, 1890, c. 647 (26 Stat. 209), known as the Sherman Antitrust Act.

At the hearing on the writ the District Court had before it the petition (R. 1), to which were attached the warrant under which appellant had been brought before the Commissioner (R. 6), the complaint (R. 6, 7), the indictment (R. 8–15), and

a transcript of the procedings had before the Commissioner (R. 16–72).

At the hearing before the Commissioner, appellant admitted his identity. The Government offered in evidence a certified copy of the indictment and rested. (R. 17.)

Thereupon Jasper Blackburn, a witness on behalf of appellant, testified he was President and General Manager of the Everstick Anchor Company, of St. Louis, Missouri, a purchaser of malleable iron castings during the period covered by the indictment, and that during such period his company had purchased all its castings from appellant's company, the Iowa Malleable Iron Company. (R. 19, 22, 30.) There were several malleable iron foundries at St. Louis, and during the period in question he had received solicitations for work from six companies, some of which he named, and two of which are defendants to this indictment. (R. 19, 20.) The witness identified six letters soliciting business received by him in the regular course of business from five malleable iron companies, only one of which is a defendant, and they were received in evidence. (R. 20–22.) He stated he had received other solicitations for business, both written and personal. (R. 22.) The Iowa Malleable Iron Company had solicited business from the witness and had never told him he had been allotted or assigned to it as an exclusive customer. (R. 24, 30.) His selection of a foundry had been based on

price, service, and quality. (R. 25.) Counsel for appellant then asked the witness which of the defendant corporations had solicited his business, naming them (R. 25–31), and it appeared that of the forty-five corporations named the witness had been solicited in person by the St. Louis Malleable Castings Company (R. 28), the National Malleable Castings Company (R. 25, 26), and by letter by the Badger Malleable and Manufacturing Company (R. 26), the Danville Malleable Iron Company (R. 27), the Wisconsin Malleable Iron Company (R. 29, 31), and the Zanesville Malleable Iron Company. (R. 30.) He was uncertain as to the Marion Malleable Iron Works (R. 28), the Dayton Malleable Iron Company (R. 26), the Illinois Malleable Iron Company (R. 27), and the Lakeside Malleable Castings Company. (R. 28.) The St. Louis Malleable Castings Company had quoted him some prices a little lower than appellant's company, but did not get any of his work. (R. 28, 29.) The witness had received other solicitations from persons whose names he could not recall. (R. 31.)

On cross-examination he stated he had never made malleable castings and knew nothing about any communications between manufacturers as to fixing of prices or allotment of customers. (R. 31, 32.)

On redirect examination he stated that he bought from 650 to 700 tons of castings per year, and, based on his experience, he had found the prices

of the Iowa Malleable Iron Company to be about the same as the prices of other manufacturers, or a little lower. (R. 32.) He was familiar with the market prices of castings during the period in question, March, 1921, to March, 1924, and the Iowa Malleable Iron Company's prices were, in his opinion, fair and reasonable. (R. 33.)

On recross-examination the witness stated a case where the St. Louis Malleable Castings Company, a defendant, had quoted a lower price on certain items, but would not take his whole order. (R. 34, 35.)

On redirect examination he stated that prices quoted were f. o. b. and there would be a slight freight saving in dealing with a near-by foundry. (R. 36.)

J. A. Scott testified he was Secretary and General Manager of Brown, Lynch & Scott Company, manufacturers of agricultural implements, and during the three years prior to March 27, 1924, he had bought all the malleable iron castings used by his company and had bought exclusively from the Iowa Malleable Iron Company. (R. 37.) His trade had been solicited personally and by correspondence. He had destroyed the correspondence. (R. 37, 38.) He had no knowledge of the Association (i. e. the trade association charged in the indictment as having been the means of carrying out the conspiracy). (R. 38.) He recalled solicitations from three named concerns, all of which are defendants, and

thought he had had other solicitations, but was not sure. (R. 38.) Some prices quoted were lower than those he obtained from appellant's company. (R. 39.) He again stated he had never heard of the American Malleable Castings Association, and had no knowledge that his company was allotted to the Iowa Malleable Iron Company as a customer or that he was restricted in any way in his purchases. (R. 39.) The witness explained that in view of the good service obtained from appellant's company he would not have been justified in incurring the expense of moving patterns from one foundry to another. (R. 39.) He was satisfied from his knowledge of conditions in the malleable iron business that he was getting a fair price. (R. 39, 40.)

On cross-examination he stated he would not have been satisfied with trade conditions if he had known that the prices were arbitrarily fixed. (R. 40, 41.)

After an adjournment, the Commissioner rendered an opinion sustaining the Government's motion to strike out the testimony of the witnesses Blackburn and Scott (R. 44–46), in which he held that while the testimony of these witnesses might be admissible on the main trial it did not tend to rebut the issue of probable cause.

The appellant himself testified he was Secretary and General Manager of the Iowa Malleable Iron Company, and that he had been employed by it for 20 years. (R. 42.) During the period covered

by the indictment he had been in charge of all departments of operation and had solicited most of the business for his company. (R. 42.) He described the foundry's product in some detail. (R. 42, 43.)

After the adjournment appellant testified that his company had customers throughout the United States west of Pittsburgh. (R. 46, 47.) Its prices had been based upon actual cost accounting records and past experience. (R. 47.) No individual, corporation, or association had ever suggested that prices should be raised or lowered. (R. 47.) Appellant offered in evidence a paper purporting to be a list of customers of the Iowa Malleable Iron Company prepared from the company records under his supervision, which was excluded as not being the best evidence. (R. 47, 48.) Counsel for appellant made an elaborate offer of proof (R. 48–50) in substance offering to disprove all the allegations of the indictment, part of which the Commissioner felt was inadmissible and part admissible. (R. 50.)

The examination of appellant continued and he stated that his company joined the American Malleable Castings Association in 1914 or 1915 for the

> * * * benefit of the research and laboratory experience and the program of technical work that the Association were putting on then and contemplated carrying on to a greater degree in the future years. (R. 50.)

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All producers of malleable iron were and had been in competition with the manufacturers of gray iron and steel. The Association had increased the tensile strength and elongation of malleable iron. It maintained a metallurgical department, the work of which he described in some detail. (R. 51, 52.) The benefit of the cooperative research work was the sole reason his company joined the Association. (R. 52.) He attended meetings of the Association at Chicago regularly, and had never discussed prices there except in a casual way with other members, nor the allocation nor assignment of customers. (R. 52, 53.) He familiarized himself with market conditions by attending meetings and solicited trade by correspondence without reference to the Association. (R. 53, 54.) The Association never requested him not to solicit business, nor did he make a similar request of anyone. (R. 54.) An objection was sustained to a question as to what the witness did upon receipt of an inquiry from a customer, before quoting a price. (R. 54.) Thereupon he categorically and seriatim denied the charges contained in the indictment. (R. 55.) He stated he obtained all of his customers—about 178 in number—in the ordinary course of competitive trade. (R. 56.) So far as he knew none of the customers he had lost had been assigned or allotted to other manufacturers. (R. 57.) Competition depended upon price, delivery, and quality. A list of his

customers was again offered in evidence and excluded on the ground that it did not tend to rebut the issue of probable cause. (R. 57.)

On cross-examination an entirely new phase of the trade association's activities was developed. Appellant admitted the Association maintained an "*information service*" in charge of Robert E. Belt, one of the defendants. As to whether his company belonged to the information service of the Association he said, "we did if we asked for it, certain information." (R. 60.)

He did not know whether other members subscribed to the information service or not. (R. 60, 61.) He testified it would be pretty hard to state in one answer what information he received from Belt. The latter would supply them with "information with reference to the character of work that a particular user possibly of malleable iron castings required and condition of pattern equipment * * *" (R. 61.) He had never assigned customers or had customers assigned to him. (R. 61.) If he had an inquiry from a customer listed by another member he would inquire of the Association as to the character of the work and condition of the customer's pattern equipment. (R. 61, 62.) He might have asked Belt for some information and received it. (R. 61.) He received no information from Belt regarding customers unless he asked for it. (R. 62.) Sometimes he would ask Belt who "listed" a buyer of malleable iron

in order that he might make inquiry of such foundry regarding the character of the customer's work. He did this because the customer frequently could not furnish the information desired with respect to his work. (R. 62.)

At this point appellant's counsel resumed direct examination. The witness testified it was impossible to quote a price without absolute and accurate knowledge as to the condition and grade of the castings required and of pattern equipment. (R. 63.) He could, and in a few instances did, obtain such information by communicating with the foundry, the name of which was supplied by the Association. (R. 64.) He only communicated with the Association as to about 10 per cent of the inquiries for business received (R. 65), and reported 25 per cent of his business. (R. 70.)

On further cross-examination he testified he saw all mail received by his company. (R. 65, 66.) At R. 66 and 67 he stated:

> And I could ask the Association for who was making that work, or who had listed them as a customer. I could use my own judgment, if I wanted to go any further, and ask the concern who had been making it for further information if I so desired. But I considered it my perfect right and privilege to quote it direct without getting any more information if I could get that information.

The following is reported on pages 67 and 68 of the Record:

> Q. Now what other information did you receive from this Company besides that?—A. I received the information as to prices of business closed.
>
> Q. What is that?—A. The prices of the business that was closed.
>
> Q. What do you mean by that?—A. The price of any contract that might be let that was already let.
>
> Q. That is, what some other company had agreed to furnish——A. No, sir, not what they had agreed to; what they had already entered into contract to furnish.
>
> Q. Entered into contract to furnish. You got that information?—A. You could if you so desired.
>
> Q. What did you use that information for?—A. That would be in response to an inquiry. You could use that information if you lost a customer.
>
> Q. Well, how did you use it?—A. Give you the information how much the other fellow beat your price if he got the business.
>
> Q. And the next time why you could——A. I could beat his.
>
> Q. You could beat his the next time?—A. If I could do it consistently and according to good business judgment.
>
> Q. And that was the reason, the sole reason, for sending in those closed contracts, was it, to this Association?—A. So far as I know.

Q. Did your Company send in closed contracts of that kind so another firm could beat you if he could beat you the next time?—A. We sent in closed contract prices; yes, sir.

Q. And you were willing to do that, knowing that somebody else was going to use that to beat your price?—A. Not necessarily knowing that. That would be up to them.

Q. You sent it in there for that sole purpose?—A. No; not for that sole purpose.

Q. What other purpose?—A. Covering business closed.

Q. Well, why would the Association care about your business closed?—A. That would give some information as to the general trend, possibly, of prices, general market conditions.

Q. That was the sole reason you sent it in, was to let them know what you were furnishing stuff for?—A. So far as I know; yes, sir.

Q. That wasn't your idea at all, was it, Mr. Hughes? Wasn't it sent in there for the reason to show that the various members of this Association were living up to their agreements?—A. No, sir; it was not

Q. Now you had listed with this Association all the customers you furnished; didn't you?—A. No.

Q. You didn't list them that way?—A. Listed them covering a certain period.

Q. Well now supposing your fiscal year—did you list all the customers you furnished for that year?—A. We listed in September

all the concerns for whom we had made castings the previous six months.

Q. That was with the Association; you sent in the list?—A. Yes.

Q. And what was the idea of sending in that list?—A. To give other concerns the benefit of inquiry if they cared to make inquiry regarding the character of that concern's work or any one of those concerns' work.

Q. So they could write to you and find out what you were making for them?—A. No, sir. So they could get information regarding pattern equipment and the character of the work.

Q. And how much you were furnishing them for?—A. No, sir.

Q. Nobody ever wrote you and asked you how much you was furnishing a certain contract for?—A. Not except—unless the contract had been closed, and wanted to know if we got the business.

Q. They wouldn't need to write you direct for that would they? They could get it from the Association.—A. They could get it from the Association.

Q. And every member of this Association had every closed contract that they made in a certain period in that Association?—A. I don't know about anybody else. We didn't have half of ours in there.

Q. Just on your allocated territory, that is where you had——A. Didn't have any allocated territory.

He testified he might have asked the Association who did the work of a particular customer or inquired about the price of business closed, but had no correspondence regarding the assignment of such customer. (R. 69.) The Association had about 60 members. (R. 69.) The following is reported on page 70 of the Record:

> By the Commissioner:
>
> Q. Mr. Hughes, there is just one question I would like to ask you. If you had some customer in mind, and say you wrote down to this Association, they would give you information as to the class of castings they were using and the pattern equipment?—A. No, no. They would give me the name of the concern, if any such concern listed that concern as a customer, so the information would be available if I cared to follow the inquiry further.
>
> Q. That is, you would have to get the condition of their pattern equipment from the concern who had been making their castings? Is that it?—A. Yes, sir.

On redirect examination the witness stated he made inquiry of the Association regarding the financial standing of some customers and reported business closed with 25 per cent of his customers. (R. 70.) This concluded his testimony.

The Commissioner thereupon declined to hear further customer witnesses, and stated (R. 71):

> I don't see where that would be material. I think that would be purely defensive, if the

> evidence was of the same class as was given by Mr. Blackburn and Mr. Scott, who were buyers of malleable iron castings used by them in the manufacture of machinery and other things that they were making. They naturally wouldn't know anything about a contract with this Malleable Castings Association and whether they regulated prices or not.

After hearing argument the Commissioner made an order of commitment as follows (R. 71, 72):

> I feel Mr. Price that on the showing made here by the evidence introduced by the Government and the defendant and by the Government on cross examination of Mr. Hughes that there is enough evidence here to show that there is some agreement and sustaining the Government's claim of probable cause for holding the defendant as a member of this Association charged with restraint of trade under the Anti-Trust Act. And with the evidence closed, the Court holds there is probable cause and the defendant will be committed and the bail fixed at $5,000.00 pending the issuance of the order of removal.

Eighteen errors are assigned to the action of the District Court (R. 77–83), the substance of which are that the proceedings resulting in appellant's detention were in violation of Article III, Section

2, Clause 3 of the Constitution, and the Fifth and Sixth Amendments thereto.*

Three points are argued in appellant's brief, which may be summarized as follows:

1. That the District Court held the indictment was conclusive evidence of probable cause and disregarded the evidence adduced before the Commissioner.

2. If the evidence before the Commissioner demonstrated lack of probable cause,

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*ARTICLE III, SECTION 2, CLAUSE 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendments.—ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

appellant was entitled to be discharged in *habeas corpus* proceedings.

3. The evidence demonstrated lack of probable cause.

SUMMARY OF ARGUMENT

In a removal proceeding in the federal courts the committing magistrate must determine three questions: (1) Whether an offense appears to have been committed; (2) whether it appears to have been committed in the judicial district to which the removal is sought; and (3) whether there is any evidence tending to show that it was committed by the accused.

The production of a certified copy of the indictment which states an offense and alleges jurisdiction in the court in which it was found, together with proof of identity, furnishes *prima facie* but not conclusive evidence of all of these three elements.

The court before which removal proceedings are pending or the court reviewing its action on *habeas corpus* should not attempt to pass on the technical sufficiency of the indictment as a criminal pleading, but should consider whether it, *as evidence,* tends satisfactorily to show the commission of an offense and jurisdiction in the court where it was found to try the accused for such offense. In the case at bar such questions as are raised as to the sufficiency of the indictment are of a character which should be left to be resolved by the trial

court, and not decided on removal proceedings. As the court in which this indictment was found had previously passed on and sustained the indictment, its decision was properly recognized as controlling in the removal proceedings. The indictment in this case is sufficient, in any event, to meet every test which can be applied.

The accused has a constitutional right to rebut the evidence against him. The scope of such rebuttal evidence is largely in the discretion of the committing magistrate. In the case at bar there was no abuse of such discretion. The court in the *habeas corpus* proceedings had before it the same evidence which was before the Commissioner, and seems to have concluded upon such evidence that probable cause existed. But whatever reason it had for discharging the writ, the order should be affirmed, since the record shows that if the evidence as well as the indictment be considered, the action of the Commissioner was correct.

ARGUMENT

I

THE INDICTMENT

(*a*) THE INDICTMENT WAS RECEIVABLE AS PRIMA FACIE EVIDENCE OF WHAT IT STATED

A certfied copy of an indictment is receivable in evidence at a removal proceeding as prima facie evidence of probable cause, but not as conclusive

evidence. *Tinsley* v. *Treat,* 205 U. S. 20, 30, 31. It is evidence, however, only of its existence and of what it states; hence if it states no offense, it will not warrant removal. But if it does state an offense, its allegations are to be taken as true, unless impaired in rebuttal.

(*b*) THE DISTRICT COURT APPRECIATED AND DISCHARGED ITS FUNCTION WITH RESPECT TO APPRAISING THE INDICTMENT

The opinion of the District Court in so far as it related to the indictment was as follows (R. 74, 75):

> As to the indictment, my duty seems to be well expressed in the Opinion of Judge McKeehan in the *U. S.* v. *Mathues, U. S. Marshal* (6 Fed. (2d) 149, 154, 155), in which he says:
>
> "After a careful consideration of this case, I am clearly of the opinion that the questions that exist regarding the sufficiency of this indictment on the three elements concerning which it is my duty to inquire, are of such a doubtful and disputable nature, that they belong to the trial court and the appellate tribunals which will or may review the proceedings there had. Demurrers to this indictment and motions to quash were filed by a number of the defendants before the trial court. Judge Westenhaver, in an opinion which I have examined, sustained the sufficiency of the indictment. It is urged that this opinion passed on the indictment

simply as a pleading and not as a paper averring certain evidential facts. No doubt an indictment might be insufficient as a pleading for some reason not involved in an inquiry as to its sufficiency in an application for a warrant of removal. But it does not follow that the converse is true, and I think that upon a demurrer or a motion to quash in a federal court, an indictment which is insufficient on any of the elements involved in an application for removal could not be sustained.

"It is further urged that the decision of the learned Judge of the trial court is not binding upon this court. That is probably true, but it has very great weight here as bearing on the probable sufficiency of this indictment. Having regard to the rule that doubtful issues of law and fact in proceedings of this nature are for the trial court, and having regard to the averments contained in this indictment and to Judge Westenhaver's opinion, I think this court would be taking a long and unjustifiable step in refusing to order the removal of these defendants on the ground that the indictment is clearly insufficient on any of the three elements involved in this inquiry. This case furnishes a good illustration of the importance of adherence to the rule that doubtful and disputable questions are for the trial court. Suppose, by way of illustration, that on application for the removal of, say, twenty of the defendants, various District Judges decide that they shall be removed, and that various District Judges decide as to another

twenty, that the indictment is insufficient and they shall not be removed. Suppose then that a trial and conviction is had in the District Court for the Northern District of Ohio, and the conviction sustained by the Circuit Court of Appeals for the Sixth Circuit, and later by the Supreme Court of the United States. The net result would be that twenty defendants would have escaped trial, because various District Judges had made erroneous decisions as to the sufficiency of the indictment.

"It is important in the interest of protecting individual rights that no defendant shall be ordered removed for trial to another district unless a qualified judicial officer shall determine after examination of the indictment that due cause for the removal exists. It is equally important, in the interest of an effective administration and enforcement of law, that every Judge to whom application for a warrant of removal is made shall not undertake to make his own independent decision on doubtful and disputable questions, but that these shall be raised and determined in the trial court, and reviewed and determined finally by the appropriate superior judicial authority."

So far as the indictment in this case is concerned, it is a general rule that if a certain District Court decides a case, such decision is by comity binding upon other District Courts until it is passed upon by some higher court. This is true though the first court decides only a principle involved, even though it arises in an entirely different case.

> Now this being generally true, the rule should have special application in a case like this, where the indictment has been reviewed fully by Judge Westenhaver, the trial Judge, who says:
>
> "In my opinion after due consideration to all objections urged and examination of adjudged cases, the indictment is unexceptionable both as to form and substance."
>
> It seems to me that this should be final at this stage of the case. In fact, it would almost seem like audacity for me to hold contrary to the opinion of Judge Westenhaver, who gave the case most careful consideration, and before whom many of the defendants are to be tried as the record now stands. (R. 74, 75.)

It is apparent from the opinion that Judge Wade in the case at bar fully appreciated his duty with respect to passing on the sufficiency of the indictment. He recognized he had the power to hold the indictment insufficient, but declined to do so because he thought the decision of the trial court in overruling demurrers (*United States* v. *National Malleable and Steel Castings Co.*, 6 Fed. (2d) 40), should be followed on the principle of comity. In *Stallings* v. *Splain*, 253 U. S. 339, it was said, on pages 344 and 345 of the opinion:

> If the validity of the indictment was open to reasonable doubt, it was to be resolved not by the committing magistrate but, after the removal, by the court which found the indictment.

In the case at bar this had already been done by the trial court.

Furthermore, if the indictment is sufficient, the reasons given by the District Court for its holding are immaterial.

(*c*) THE INDICTMENT CHARGES AN OFFENSE AGAINST THE UNITED STATES, ALLEGES JURISDICTION IN THE TRIAL COURT, AND WAS THEREFORE SUFFICIENT ON REMOVAL

The indictment charges that certain named separate and independent corporations from January 1, 1917, to March 27, 1924, manufactured 75% of the malleable iron castings made in the United States and sold large quantities thereof in interstate trade and commerce in the Eastern Division of the Northern District of Ohio and elsewhere. (R. 8–12.) Named officers and agents of such corporations, including the appellant, who were "actively engaged in the management, direction, and control of their affairs and business and of their said interstate trade and commerce" are made defendants with the corporations. The appellant is charged to have been an officer and agent of Iowa Malleable Iron Company (R. 12, 13), a corporation defendant having a foundry at Fairfield, Iowa. (R. 10.) One R. E. Belt is made a defendant, he, it is charged, having been secretary and actively engaged in the management of the American Malleable Castings Association, a voluntary

trade association to which each corporate defendant belonged. (R. 14.)

The indictment charges that within the Eastern Division of the Northern District of Ohio all of said defendants "engaged in a combination in restraint of said interstate trade and commerce in malleable iron castings so carried on by said corporate defendants" described as follows (R. 14–15):

> Throughout said period of time said corporate defendants, under said management, direction, and control of their said officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves, as to prices, terms, and conditions of sale, and as to customers; and by agreement have from time to time fixed excessive and noncompetitive prices to be charged by all of them for said castings; and have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers; and have enforced such assignments by refraining, directly or indirectly, from competing for customers so assigned.

> And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, as a means of securing compliance on the part of each of said corporate defendants with the terms of said agreements, said corporate defendants, throughout said period of time, have been members of and have maintained an organization known as The American Malleable Castings Association, with headquarters at Cleveland, Ohio, and have required said association, among other things, to collect and receive from each of its members information as to the details of such member's business and to distribute such information among all the members for their use in avoiding and preventing breaches of said agreements.

The indictment is good because it charges that the defendants, producers of 75% of malleable iron castings (1) assigned and allotted customers, (2) by agreements fixed excessive and noncompetitive prices, and (3) thereafter refrained from competing for the trade of such customers. The mere doing of the specified acts constitutes an unreasonable combination in restraint of trade. Where, as here, the primary purpose and effect of the combination is to restrain trade, the question of reasonableness is not involved. In *United States* v. *Addyston Pipe and Steel Company,* 85 Fed. 271, Chief Justice Taft, then Circuit Judge (Harlan and Lurton concurring), after discussing the legality of contracts where the restraint complained of

was ancillary to a legitimate main purpose (e. g., a contract by the seller of property not to compete with the buyer and thus diminish the value of the property sold), said (pp. 282, 283):

> But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly and therefore would be void.

Counsel for appellant attack the indictment (Brief 28) on the authority of *Weeds, Inc.* v. *United States,* 255 U. S. 109, where it was held that the phrase "excessive prices" as used in Section 4 of the Food Control Act (Act of August 10, 1917, c. 53, 40 Stat. 276, as amended by Section 2 of the Act of October 22, 1919, c. 80, 41 Stat. 297) was unconstitutional because it set up no ascertainable standard of guilt. This case has no application to the use of the phrase "excessive and noncompetitive prices" in an indictment charging a violation of the Antitrust Laws.

The case of *Chicago Board of Trade* v. *United States,* 246 U. S. 231, cited by counsel for appellant (Brief 28), is not in point. It was only decided there that the facts of that case did not show a violation of the Antitrust Law.

Counsel also endeavor to bring the case at bar within the decisions in *Maple Flooring Manufac-*

turers Association v. *United States*, 268 U. S. 563, and *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588. There is nothing except their assertion to support this view. As previously noticed, the indictment here charges a conspiracy to fix excessive and noncompetitive prices and to assign and allot customers among the defendant manufacturers. In the *Maple Flooring case*, Mr. Justice Stone said on page 586 of the opinion:

> We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

And in the *Cement case* it was stated, on pages 604 and 605 of the opinion:

> Agreements or understandings among competitors for the maintenance of uniform prices are of course unlawful and may be enjoined, but the Government does not rely

> on any agreement or understanding for price maintenance.

The other objections made to the indictment are equally unsubstantial. By way of illustration it is stated, on pages 28 and 29 of the appellant's brief—

> As to the charge that the corporate defendants allotted and assigned customers to one another, it is to be observed that the indictment does not even allege that this was done by agreement and is apparently based on the view that the Sherman Act imposes a duty to compete—a theory which this court has definitely repudiated.

Touching this point the indictment alleges that the defendants

> * * * by agreement, have from time to time fixed excessive and noncompetitive prices to be charged by all of them for said castings; have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be held as exclusive customers, and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned. (R. 14.)

The sufficiency of the indictment was vigorously attacked on the petition for *certiorari* filed in this court in *Fitzgerald* v. *United States* (1st Cir.), 6 Fed. (2d) 156, denied October 19, 1925, 46 Sup. Ct. Rep. 26. It was specifically held sufficient on re-

moval by the Circuit Court of Appeals for the Sixth Circuit in *Meehan* v. *United States,* decided March 12, 1926, printed as Appendix A. The Government has also prevailed in the following cases, involving the removal of other defendants to this indictment:

United States v. *Mathues,* 6 Fed. (2d) 149 (D. C. E. D. Penna.);
United States v. *Moore,* 7 Fed. (2d) 734 (D. C. E. D. Ill.);
Steeves v. *Rodman,* 10 Fed. (2d) 212 (D. C. D. R. I.);

and in numerous unreported decisions. In *Nourse* v. *White* and *Rutz* v. *Anderson,* not yet reported (C. C. A. 7th Cir.), judgments dismissing the writ were reversed (opinions printed as Appendices B and C) on the sole ground that the District Judges (sitting as committing magistrates) in each case should have heard rebuttal evidence offered on behalf of the defendants. The defendant Rutz and two of his codefendants have since been ordered removed, and petitions for writs of *habeas corpus* denied.

II

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO REBUT THE ISSUE OF PROBABLE CAUSE AND HAD A FAIR HEARING BEFORE THE COMMISSIONER

Counsel for appellant do not point out wherein the proceedings before the Commissioner or the

District Court violated the Fifth Amendment; and it is assumed that they now rely on Article III, Section 2, Clause 3 of the Constitution, and the Sixth Amendment as the ground of their appeal. The rights secured by both of those provisions of the Constitution is the right of trial in the State and district wherein the crime shall have been committed. If, therefore, appellant committed a crime against the United States in the Northern District of Ohio, he had neither legal nor constitutional right to object to removal to the District where the trial was to be had. His right at the hearing before the Commissioner was to rebut probable cause, and this is an issue which he could meet only by showing that the charge was "wholly groundless." *Burr's Trials,* Vol. I, p. 11.

Mere denial of the allegations of the indictment is not sufficient to rebut probable cause.

Beavers v. *Haubert,* 198 U. S. 77, 90, 91.
Looney v. *Romero,* 2 Fed. (2d) 22.
Ex parte Ryan, 154 Fed. 217.

Furthermore, where, as here, the hearing demonstrates that there are questions requiring "consideration of many facts and seriously controverted questions of law," they should be left to the determination of the court where the indictment was found. *Rodman* v. *Pothier,* 264 U. S. 399, 402.

In *Tinsley* v. *Treat,* 205 U. S. 20, *supra,* a district judge, sitting as a committing magistrate in a proceeding under Section 1014, Revised Statutes, held an indictment charging an offense against the

Sherman Law to be conclusive evidence of probable cause and declined to hear evidence offered by the accused. Such action was held to deprive the defendant of a right secured by statute under the Constitution. But this is not a case like *Tinsley* v. *Treat*. At the very outset of the hearing (R. 18) the Commissioner stated:

> And I believe that the defendant would have a right to offer evidence if this motion [i. e. a motion to discharge appellant from custody R. 17] is finally overruled.

The summary of the evidence before the Commissioner, *supra*, illustrates beyond cavil that he adhered to this theory throughout the hearing and that appellant was permitted to testify fully concerning the matters charged in the indictment. The Commissioner was willing to hear any evidence which in his opinion would tend to rebut the issue of probable cause.

The concluding part of his opinion striking out the testimony of Blackburn and Scott reads (R. 46):

> The question of probable cause goes to the point as to whether or not there has been an offense against the Government and whether there are reasonable grounds to believe the defendant to have been a party to it and not on the question of his guilt or innocence under said charge, that to be determined by trial in the Court having jurisdiction.

> In the light of the foregoing, it is my opinion that evidence offered on the part of the defendant which is strictly defensive in its nature is not admissible and the motion to strike such evidence as has already been heard, of a defensive nature, made by Counsel for the Government is sustained.
>
> The Motion to commit or bail for appearance for trial by Counsel for the Government and Motion to dismiss are not herein ruled on pending such further proceeding or evidence offered at time to which this cause has been continued.

As further showing the sound reasoning which led the Commissioner to decline to hear the testimony of so-called "customer" witnesses it will be observed he stated on page 58 of the Record:

> The way I look at it, as I have stated before, if the customer didn't know that he was held as a customer of a certain organization because of some agreement that the manager of that plant had entered into, and if there was such an agreement, and by reason of that fact he wasn't buying as cheaply as he could, his testimony that he didn't know those facts to exist wouldn't amount to a great deal.

The text of the opinion shows that the Commissioner had examined the indictment and thought it charged an offense and showed a venue in the Northern District of Ohio. (R. 45.) It further shows he had before him and was guided by *Collins* v. *Loisel,* 259 U. S. 309; *Price* v. *Henkel,* 216 U. S.

488; and *Charlton* v. *Kelly,* 229 U. S. 447. (R. 45.)

The Commissioner's action in excluding the testimony of these two "customer" witnesses is vigorously criticized by counsel for appellant, particularly his holding that their testimony was inadmissible because "strictly defensive." But that is the very distinction made in *Collins* v. *Loisel, supra,* where Mr. Justice Brandeis, speaking for the court, said, on pages 315 and 316 of the opinion:

> Collins was allowed to testify, and it was clearly the purpose of the committing magistrate to permit him to testify fully, to things which might have explained ambiguities or doubtful elements in the *prima facie* case made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense. It is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal.

That case and *Charlton* v. *Kelly, supra,* related to proceedings the purpose of which were to extradite the accused to a foreign country. The functions of a committing magistrate in such case are the same as in a hearing under Revised Statutes, Section 1014 (*United States* v. *Levy,* 268 U. S. 390, 393), except that in an extradition case, obviously a broader and more detailed inquiry into the charge against the accused is in order. *Beavers* v. *Henkel,* 194 U. S. 73, 82, 83.

The testimony of Blackburn and Scott, taken at its highest value, was unresponsive to the issue presented. These two purchasers of malleable iron castings, one of whom had never heard of the trade association, charged to have been the instrumentality by which the conspiracy was effected (the record is silent as to the other's knowledge), testified that their trade was solicited by a small percentage of the defendants and certain other manufacturers who did not belong to the Association. They thought the prices of appellant's company were fair and reasonable. In their opinion they could have bought castings elsewhere on the same or better terms. However, during the period covered by the indictment, both witnesses bought all their castings from the Iowa Malleable Iron Company. Of course, they had never been told they were assigned to any manufacturer as exclusive customers. The St. Louis Malleable Iron Company, a defendant, had offered to do some of Blackburn's work at prices lower than those he was paying, *but would not take all the work.*

The testimony of appellant touched on all points of which "customer" witnesses could have had knowledge and many other matters. His repeated assertion (R. 50, 52) that the only reason his company had joined the American Malleable Castings Association was in order to obtain the benefit of the scientific work was disproved on his cross-examination. It appeared there (R. 60 *et seq.*) for the

first time that his company had subscribed to an information service maintained by the Association. Such service, of which it is to be desired that the record might contain more information, had nothing whatever to do with metallurgical or scientific work. Under it appellant periodically filed lists of his customers with the Association (R. 68), and received information as to the prices of all business closed by other members. (R. 67.) Appellant also sent to the Association information as to business done by his company (R. 67), and could obtain from it information as to who had listed a buyer of castings as a customer. (R. 66.) He could use his own judgment as to whether he should go further and get information from the foundry which had listed a customer. (R. 66.) The explanation of this scheme was that appellant was thereby enabled to obtain information from his competitors as to their previous experience with the customer.

On a removal hearing, the committing magistrate has a broad discretion in refusing to hear evidence. As stated in *Collins* v. *Loisel*, 259 U. S. *supra*, 309, at page 317:

> Whether evidence offered on an issue before the committing magistrate is relevant is a matter which the law leaves to his determination, unless his action is so clearly unjustified as to amount to a denial of the hearing prescribed by law.

Certainly a grave doubt may have existed in the mind of the Commissioner as to the legality of the

conditions under which appellant was conducting his business. The situation developed on appellant's examination is within the rule stated in *Henry* v. *Henkel,* 235 U. S. 219, at page 227:

> These important and far-reaching questions, though elaborately argued, should not be decided on this record, in view of the rule relied on by the Government that such issues must primarily be determined by the trial court.

It is submitted that the record discloses that appellant had a hearing which in no wise deprived him of his constitutional rights and that the discretion of the Commissioner in ruling on the admissibility of evidence offered and rejected should, in this instance, be not disturbed.

III

THE DISTRICT COURT HAD BEFORE IT ALL THE EVIDENCE AND UPON IT CONCLUDED THAT PROBABLE CAUSE EXISTED, BUT WHATEVER REASON IT HAD FOR DISCHARGING THE WRIT, THE ORDER SHOULD BE AFFIRMED SINCE THE RECORD SHOWS APPELLANT HAD A FAIR HEARING BEFORE THE COMMISSIONER.

The precise question before the District Court (it is also the question here) was whether on the record before it, which consisted of a transcript of all the proceedings before the Commissioner, there

was any substantial evidence upon which the Commissioner might, in the exercise of his jurisdiction, have decided that there was probable cause for believing that appellant had committed the offense charged in the indictment. If so, it had no function except to discharge the writ. *Price* v. *Henkel,* 216 U. S. 488, 491.

The opinion of the District Court in so far as it related to probable cause was as follows (R. 73, 74):

> When we compare and analyze all the authorities submitted in the very complete briefs of counsel, the only real question in this case is the sufficiency of the indictment.
>
> If the indictment is sufficient and the identity of the defendant is admitted or proven, a complete case for removal is established.
>
> Language is found in the cases which seem to indicate that the defendant is entitled to a hearing upon the merits of the question of guilt or innocence, but this question was very definitely disposed of by the Circuit Court of Appeals in this Eighth Circuit in the recent case of *Looney* v. *Romero, U. S. Marshal,* 2 Fed. (2d) 22, in which it is said:
>
> "Position of the appellant at the hearing, and his evidence, was simply to the effect that he did not commit the crime; that of course is a matter to be tried out under the indictment."

> It is my duty to follow this last announcement of the Court of Appeals of this Circuit.

Counsel for appellant admit that the *Commissioner* based his finding on the indictment and the evidence of appellant (Brief 57), but argue that the *District Court* erred in disregarding such evidence.

They overlook the fact that whatever Judge Wade's reasons for discharging the writ may have been, if his action in doing so was correct, the judgment should be affirmed.

Upon analysis of Judge Wade's opinion, it does not appear that he refused or declined to consider the evidence before the Commissioner. He held that if the indictment is sufficient and the identity of the defendant is proven, a complete case for removal is established. This is so if such case is not rebutted by the defendant. He rested his decision squarely on the case of *Looney* v. *Romero, supra,* where the rule is very clearly stated that an indictment is to be taken only as *prima facie* evidence of probable cause. Necessarily, the District Judge must have had in mind the fact that such *prima facie* case, as every *prima facie* case, connoted a corresponding right in the defendant to rebut. Any other inference would ignore the meaning of "*prima facie.*" The other point decided in *Looney* v. *Romero* was that a denial of guilt by a defendant

is a matter to be tried out where the indictment was found. Judge Wade's opinion quotes the statement to that effect from *Looney* v. *Romero*, and the fair inference to be drawn is that he considered appellant's testimony to amount to no more than an elaborate denial of guilt.

CONCLUSION

The sole question presented by this appeal is whether there was any substantial evidence before the District Court and the Commissioner, upon which, in the exercise of their judicial discretion, they could reasonably have decided that there was probable cause to believe appellant had committed the offense charged in the indictment. For the reasons set forth above it is submitted that the appellant's contention has no merit.

Inasmuch as the Commissioner's rulings on evidence are not reviewable on *habeas corpus* proceedings there is in this case no contention which could possibly be open for argument in the Circuit Court of Appeals. No ground, therefore, exists for transferring the appeal to the Circuit Court of Appeals under section 238a of the Judicial Code (Act of September 14, 1922, c. 305, 42 Stat. 837). There is no conceivable ground upon which that court could decide in favor of the appellant. Such a transfer would result only in delay.

It is therefore respectfully submitted that the order of the District Court discharging the writ be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
CLIFFORD H. BYRNES,
Special Assistant to the Attorney General.

APRIL, 1926.

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS SIXTH CIRCUIT

4460

G. F. MEEHAN, APPELLANT, *v.* UNITED STATES, APPELLEE—APPEAL FROM THE DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

4573

E. C. HOWELL, APPELLANT, *v.* UNITED STATES, APPELLEE—APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Decided March 12, 1926

Before DENISON, DONAHUE and MOORMAN, *Circuit Judges.*

DENISON, *Circuit Judge:* These two appeals present substantially the same question and were heard together. In the Northern District of Ohio, at Cleveland, an indictment was returned charging violation of the Antitrust law. The defendants were the American Malleable Castings Association, many firms or corporations said to be members of the association, and many individuals said to be the active managers of the corporations. One of these individuals—Meehan—whose home and whose corporation's place of business were in Knoxville, Tennessee, was arrested for the purpose of removal, was taken before a Commissioner for the purpose, a hearing was had and the Commissioner refused

an order of removal. Thereupon he was taken before the District Judge, who again heard the application for removal made by the Government and granted it. Upon *habeas corpus* proceedings before the same judge, the order of removal was held proper and Meehan was remanded for that purpose. His appeal from this order is number 4460. Number 4573 is the appeal of Howell, coming from the Western District of Michigan. He was another defendant in the same indictment, was also ordered removed to Cleveland and, upon his *habeas corpus* petition, was remanded so that the warrant of removal might be executed.

Upon the removal proceedings before the judge in the Meehan case, it was first objected that the order of the Commissioner denying removal constituted an adjudication. This contention being overruled, the Government offered a certified copy of the indictment, and also documents which it was said would constitute part of its proofs upon the trial. These included the Rules of the Association, its membership list and certain letters said to have been exchanged with members in furtherance of the unlawful purpose of the Association. One of these letters was from Meehan's corporation and was signed by him. Thereupon, Meehan testified, admitting his identity with the defendant named in the indictment, and admitting the existence of the Association, his corporation's membership in it and his managerial relation to the corporation. He and other witnesses called for him described in detail the history of the relation between his corporation and the association, and what had been done by the corporation in connection with its membership. The testimony was presented as a com-

plete denial of any act by or for the corporation in connection with its membership. The testimony was presented as a complete denial of any act by or for the corporation, or by Meehan, which would be in violation of the Antitrust law. At the end of the hearing the Government claimed that probable cause appeared, not only from the indictment but also from the proof, while Meehan claimed that the initial effect of the indictment, as justifying removal, was conclusively destroyed.

In this court the sufficiency of the indictment is attacked, and, on the other hand, it is said that the indictment must be judged not as a criminal pleading but as a piece of evidence. Considering it as a criminal pleading, and without doubting that an indictment may so completely fail to charge an offense, "however inartifically" that it can not be "evidence tending to establish" anything and could not support a removal order, it is enough to say that this indictment is not subject to that measure of condemnation. It charges in terms a violation of the Sherman Act, and then sets out facts which the pleader plainly intended to constitute the necessary support for the charge. Whether these facts were sufficient to carry the case over the sometimes doubtful line between reasonable and unreasonable restraint of trade, was not a question to be decided in the removal proceedings (*Pierce* v. *Creecy,* 210 U. S. 387, 401–2; *Henry* v. *Henkel,* 235 U. S. 219, 229; *Morse* v. *U. S.,* 267 U. S. 80, 83), but is for the courts of the trial jurisdiction; and the reviewing powers of this court in this proceeding are not affected by the fact that it may later be called upon to review the trial at Cleveland.

When we come to the function of the indictment as evidence, we find some confusion in the cases, or at least in the thoughts expressed. If it were taken as *prima facie* evidence of guilt, in the largest sense of the term, "*prima facie*," logical difficulties would arise, because then it would continue of full force, and at the end of every removal proceeding there would be a conflict of evidence, which that tribunal could not try. The cases usually speak of it as *prima facie* evidence, not of guilt, but of the existence of probable cause. This is perhaps another way of saying that it raises an initial presumption—which might as well be arbitrary as evidential—which continues until it is in some vital particular overcome by entirely convincing testimony. Wherever there is affirmative proof, unchallenged except by the indictment, demonstrating lack of guilt, removal should be denied; if the conclusion of no probable cause is put in any substantial doubt by proofs in addition to the indictment, the removal should be made. These we take to be the applicable principles as expressed in the late cases. (*Haas* v. *Henkel*, 216 U. S. 462; *Price* v. *Henkel*, 216 U. S. 488; *Beaver* v. *Henkel*, 194 U. S. 73, 85; *Morse* v. *U. S.*, 267 U. S. 80.)

It follows, we think, as applied to this kind of case, that whenever guilt lies in the unlawful use of those association facilities which may be used rightly or wrongly, and any particular defendant by credible testimony disputes any connection whatever by him with any unlawful activities of such ambiguous association, the Government should make some proof of his guilty activities. Hence, in this case, the letters between the Association and members in Pittsburgh and other places which (it

is said), reveal the employment of unlawful plans and methods, have no necessary tendency to show that Meehan and his company in Knoxville participated in anything forbidden. There remains, however, in this case, a letter written by Meehan to the Association in 1919. The true interpretation of the letter and of the explanation which Meehan gives, will be for the tribunal which tries the case. We can not now say that there would be error of law upon that trial if the letter in connection with the (perhaps) deficient explanation which Meehan gives, were taken by the jury, in connection with proof of the general character of the Association, as the basis of an inference that he and his company were then using the Association structure for unlawful purposes. So we find here what may rightly be thought probable cause for bringing Meehan and his company to trial.

We do not overlook that this letter was written more than three years before the indictment. In some situations that would be the end of it; but the subject matter here involved is the manner of employing methods of business and facilities of doubtful legality. Meehan and his company continued to belong to the Association up to the date of the indictment; there is no evidence that they revised their methods or underwent any change of spirit; Meehan's testimony regarding the letter is rather a denial of certain possible meanings than a claim that it was an instance of methods now abandoned. Upon the whole we can not say that there was no probable cause for believing that the methods indicated by the letter continued up to a time within the statute of limitations. The order in 4460 must be affirmed.

In 4573 no evidence was presented for Howell; the appeal raises only the sufficiency of the indictment; and with one exception the case is covered by what has been said. It is insisted that Howell is not specifically implicated, and hence that no offense is charged against him. The indictment, after having named the corporations, said that "Said corporations * * * respectively have had divers officers and agents who have been actively engaged in the management, direction, and control of their affairs and business;" and that "such officers and agents" are named in the following list showing with which corporation they have been affiliated. In this list the name of Howell is given in affiliation with one of the corporate defendants. The indictment then charges that the corporate defendants "under said management, direction, and control" have carried on their business in the unlawful way. Distributing these allegations, there is a distinct charge that the corporate defendant, in its unlawful acts, has been under the management, direction, and control of Howell, and that its elimination of competition by agreement and its allotment of exclusive customers, have been done under Howell's direction. This seems to us sufficient, either under the general principles involved or under Section 14 of the Clayton Act. The sufficiency of the indictment upon this point of personal participation by Howell is not destroyed by the evidence offered by the Government in support of the removal petition, from which it appeared that he was represented on the membership list to be "Assistant Manager" of his corporation, while the company had some one else as president, and some one else as general manager. These

nominal titles do not necessarily indicate the scope of the activities of the officers or agents in such a way as to neutralize the distinct charge of the indictment.

The order in 4573 will also be affirmed.[1]

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[1] Former reported opinions in removals growing out of this same indictment are: *U. S.* v. *Mathues*, 6 Fed. (2) 149; *Fitzgerald* v. *U. S.*, 6 Fed. (2) 156; *U. S.* v. *Moore*, 7 Fed. (2) 734.

APPENDIX B

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October Term, 1925, January Session, 1926

No. 3623

UNITED STATES OF AMERICA EX REL. RUPERT A. NOURSE, APPELLANT, *v.* R. J. WHITE, UNITED STATES MARSHAL, APPELLEE.—APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

February 15, 1926

Also appeals in Nos. 3624, 3625, 3626, 3627, 3628, 3629.

Before ALSCHULER, PAGE and ANDERSON, *Cir. JJ.*

ALSCHULER, *Cir. J.*: These seven appeals were by stipulation heard upon the same record, the applicable facts being the same in all. Appellants, residents of the Eastern District of Wisconsin, with other individuals and various corporations, were jointly indicted in the Northern District of Ohio for alleged violation of the Sherman Antitrust Act, and their removal to the Ohio district was undertaken. Hearing was had before the district judge of their district, and on behalf of the Government the indictment only was offered in evidence,

and was received over objection of appellants. Thereupon appellants offered to make proof by their own testimony and by that of others in rebuttal of the *prima facie* probable cause which the judge held that the evidence of the indictment afforded. Upon the Government's objection it was held that the evidence was incompetent and the witnesses were not permitted to testify, and the formal tender of proof made on behalf of appellants was rejected. Upon refusal of appellants to give bail they were thereupon ordered into custody for removal, whereupon, on behalf of each appellant, petition for *habeas corpus* was sued out, to which appellee made return, setting up all that transpired at the hearing before the judge. The ground alleged in the several petitions was that the petitioner was denied opportunity at the hearing to show by evidence a want of probable cause of his guilt, and was thus denied his constitutional rights in such respect. After the hearing of the several writs of *habeas corpus* the judge ordered them dismissed, and the petitioners remanded to the custody of the marshal. The appeals are from these final orders.

With the district judge's action in admitting the indictment in evidence and holding it to be *prima facie* showing of probable cause, we are in accord. But, identity being conceded, it is evident from the record that the judge regarded the indictment as irrebuttably establishing probable cause. This view is not sustained by the case of *Tinsley* v. *Treat,* 205 U. S. 20. It was there said, respecting the duty of a district judge in the removal proceeding,

> "And it has been repeatedly held that in such cases the judge exercises something

> more than a mere ministerial function involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same."

There, as here, after the indictment had been received in evidence the defendant sought to present evidence to rebut the probable cause which the indictment primarily established. Cases were cited to the court to indicate that the indictment afforded *prima facie* evidence of probable cause, but it had not theretofore been determined whether evidence on the part of the accused to rebut this presumption could be admitted. In this situation the court said:

> "It was held in *Beavers* v. *Henkel*, 194 U. S. 73; *Benson* v. *Henkel*, 198 U. S. 1; *Hyde* v. *Shine*, 199 U. S. 62, as well as *Greene* v. *Henkel*, *supra*, that an indictment constituted *prima facie* evidence of probable cause, but not that it was conclusive.
>
> We regard that question as specifically presented in the present case and we hold that the indictment can not be treated as conclusive under section 1014.
>
> This being so, we are of opinion that the evidence offered should have been admitted."

The court held that by exclusion of the rejected evidence, the constitutional rights of the petitioner, had been invaded, and that he was entitled to discharge on *habeas corpus*.

This ruling has been followed without question. This court applied it in *United States* v. *Black*,

160 Fed. 431. Indeed, counsel for the Government freely concede that the case controls, and that if these appellants were denied the right of presenting on the hearing evidence to show want of probable cause, the order of the district judge must be reversed. But they contend that the proof which was offered, if admitted, could not have overcome the *prima facie* case which the Government made. But again the striking similarity in the essential facts of *Tinsley* v. *Treat* comes to appellants' aid. There the offense whereon the indictment was predicated was similar to that here, and upon the hearing of the removal proceeding, after the indictment had been received in evidence, defendant's counsel offered to prove by the defendant and other witnesses that the court of the district in which the indictment was found had no jurisdiction of the defendant, and that the defendant and other witnesses would, if permitted, testify that the defendant never did the acts charged in the indictment at any time or place. To this the Government objected and the court sustained the objection. There, as here, it was claimed for the Government that the evidence was immaterial and could not have served to show want of probable cause. In this situation the court said:

> "It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course, if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie,* then evidence tending to show that no offense triable in the Middle District of Tennessee had been

committed by defendant in that district could not be regarded as immaterial."

The offer of proof here made was surely not less specific or relevant than on the same issue in *Tinsley* v. *Treat*. That the evidence here offered would have been competent in defense on the trial of the cause cannot, as is contended, influence its competency or effect on the preliminary issue of probable cause. There is no necessary relation between the two. Within reasonable limitations the offered evidence was proper as tending to inform the judge whether there was "such reasonable ground to suppose him guilty as to make it proper that he should be tried." (See *Collins* v. *Loisel*, 259 U. S. 309.)

Because of the refusal to hear any evidence for appellants which might tend to establish want of probable cause, the orders of dismissal of the writs and remandment of the several appellants are reversed, and the causes are remanded, with direction to discharge the several appellants from custody, without prejudice to a renewal of application to remove, and procedings thereon not inconsistent herewith.

A true Copy.

Teste:

_____ _____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

APPENDIX C

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October Term, 1925, January Session, 1926

No. 3648

UNITED STATES OF AMERICA EX REL. F. C. RUTZ, APPELLANT, *v.* PALMER E. ANDERSON, UNITED STATES MARSHAL, APPELLEE—APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

February 15, 1926

Also appeals in Nos. 3649 and 3656.

Before ALSCHULER, PAGE and ANDERSON, *Cir. JJ.*

ALSCHULER, *Cir. J.:* The three appeals were heard on the same record. Appellants, residents of the Northern District of Illinois, were, with others, indicted in the Northern District of Ohio. They are codefendants in the indictment referred to in case No. 3623, *United States ex rel. Nourse* v. *White, Marshal,* opinion in which is this day filed.

The facts, as stated in the *Nourse case,* are in all essential particulars like those appearing on this record, save only that in the instant cases, prior to the proceedings before the Illinois district judge, removal proceedings were had before a United States commissioner of that district, who heard

evidence, and, holding that probable cause did not appear, discharged appellants. Later the proceedings set out in the petition and return shown in this record were instituted before the district judge. It was then contended for appellant Rutz that the action of the commissioner was final, and this question went to the Supreme Court, where it was held that, notwithstanding the discharge by the commissioner, a new proceeding for removal could be entertained by the district judge. *United States ex rel. Rutz* v. *Levy,* 268 U. S. 390.

The appeals here, as in the *Nourse case,* are from orders dismissing writs of *habeas corpus* and remanding appellants for removal, following the holding of the district judge that the indictment offered in evidence sufficiently indicated probable cause, and that no evidence would be received in rebuttal. What we said in the Nourse case is likewise here applicable.

Because of refusal to hear any evidence for appellants which would tend to show want of probable cause, the orders of dismissal of the writs and remandment of the several appellants are reversed, and the causes are remanded, with direction to discharge the several appellants from custody, without prejudice to renewal of application to remove, and proceedings thereon not inconsistent herewith.

A true Copy.
Teste:

_____ _____,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

○

SUPREME COURT OF THE UNITED STATES.

No. 513.—October Term, 1925.

The United States of America ex rel. W. V. Hughes, Appellant, *vs.* Roy B. Gault, United States marshal.	Appeal from the District Court of the United States for the Southern District of Iowa.

[May 3, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

The relator was indicted for violation of the Anti-trust Act of July 2, 1890, (c. 647,) in the Eastern Division of the Northern District of Ohio. He appeared, upon notice, before a Commissioner of Ottumwa, Iowa, and after a hearing he was ordered to be held for removal. Rev. Stat. § 1014. The relator thereupon applied to the judges of the District Court for a writ of *habeas corpus* on the grounds that the indictment was bad and that the Commissioner rejected evidence that the relator was innocent and that therefore there was no probable cause to believe him guilty of a crime in Ohio. He also prayed for a writ of certiorari to bring the proceedings below before the Court. The writs were issued and after a hearing the District Court denied the relator his discharge and directed an order of removal to be prepared. The relator appeals under § 238 of the Judicial Code, March 3, 1911, c. 231, 36 Stat. 1087, 1157, before the Act of February 13, 1925, c. 229, went into effect. The grounds alleged are that by the refusal to hold that the indictment did not show probable cause to believe the relator guilty and that by the exclusion of the evidence the relator was deprived of his right to be tried in the District wherein the crime was committed, Constitution, Art. 3, Section 2, and Amendment VI, and that he was detained without due process of law. Amendment V.

The Constitution does not require any preliminary hearing before a person charged with a crime against the United States is brought into the Court having jurisdiction of the charge. There

he may deny the jurisdiction of the Court as he may deny his guilt, and the Constitution is satisfied by his right to contest it there. With immaterial exceptions any one in the United States is subject to the jurisdiction of the United States and may be required to stand trial wherever he is alleged to have committed the crime. In *Tinsley* v. *Treat*, 205 U. S. 20, 33, the conclusion is not that the appellant by being denied the right to present any evidence was deprived of his rights under the Constitution, but that he was denied 'a right secured by statute under the Constitution.'

As that instrument does not provide for bringing the accused into the power of the Court authorized to try him, a statute was necessary and is found in Rev. Stat. § 1014. This might have been interpreted as contemplating a summary order without other hearing than was necessary, when there was an indictment, to show that fact and that the person present was the person charged. The hardship of removal, however, has grown with the growth of the United States, and there is a natural desire to prevent it when possible, if a preliminary sifting will show that there is no probable cause for the charge. Accordingly it is held that the District Judge on application to remove acts judicially and that probable cause must be shown. *Beavers* v. *Henkel*, 194 U. S. 73, 83. *Tinsley* v. *Treat*, 205 U. S. 20, 27, 29, 32. It is to be noticed however that "where any offender . . is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender . . is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal" &c. But the commitment, supposed by these words already to have taken place, is entrusted not only to judges and commissioners of the United States, and judges of state courts, but to any 'mayor of a city, justice of the peace, or other magistrate, of any State where he may be found.' Obviously, in order to make it the duty of the judge to issue the warrant a mayor or a magistrate not a lawyer cannot be expected to do more than to decide in a summary way that the indictment is intended to charge an offense against the laws of the United States, that the person before him is the person charged and that there is probable cause to believe him guilty, without the magistrate's being held to more than avoiding palpable injustice. He is not intended to hold a preliminary trial and if probable cause is shown on the

government side, he is not to set it aside because on the other evidence he believes the defendant innocent. The rule that would apply to a mayor applies to a commissioner of the United States.

The relator testified before the Commissioner both in general terms and in detail that he and his company were innocent. The Commissioner excluded further details from him confirmatory of what he had sworn and evidence of customers that they were acquired in the way of competitive trade, seemingly on the ground that they would not or at least might not know that they were held as customers because of an agreement among the defendants, and also on the ground that he was not called on to listen to merely defensive proof: an opinion that he expressed. On a summary proceeding like this even if the exclusion was wrong it would not be enough to invalidate the order of removal, as the Commissioner indicated by his finding that he thought there were substantial grounds for the charge of guilt and that it was not for him to decide whether they were met by the denials of the defendant even if they seemed convincing. *Collins* v. *Loisel*, 259 U. S. 309, 314, 315.

We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of District Courts and by the Circuit Court of Appeals for the Sixth Circuit as sufficient for removal purposes. It alleges that the Iowa Malleable Iron Company under the charge of the relator was party to an agreement to eliminate competition in interstate trade and to fix excessive and noncompetitive prices and that the company and the relator are engaged in a conspiracy in restraint of trade among the States. The relator is not left in doubt of the effort of the grand jury to present him as criminal under the Sherman Act.

It is pointed out in *Beavers* v. *Henkel*, 194 U. S. 73, 83, that there are much stronger reasons for caution in surrendering an alleged criminal to a foreign nation than are required before removing a citizen from one place to another within the jurisdiction, yet in the latest case on extradition it is said that '*habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.' *Fernandez* v. *Phillips*, 268 U. S. 311, 312. So

far as the attack upon the order of removal is by *habeas corpus* this would seem to apply. *Price* v. *Henkel,* 216 U. S. 488, 492.

But to recur to what we intimated at the beginning, the requirements of the statute, be they greater or less, are not requirements of the Constitution but only in aid of the Constitution, made, in rather a remote sense, 'in order that any one accused shall not be deprived of this constitutional right' to be tried in the District wherein the crime shall have been committed. 205 U. S. 32. A statement in *Harlan* v. *McGourin,* 218 U. S. 442, 447, that *Tinsley* v. *Treat* held the exclusion of evidence to be a denial of a right secured under the Federal Constitution is inaccurate as we have shown. The relator's contention that he has been deprived of constitutional rights fails.

It follows that the order of the District Court must be affirmed.

Order affirmed.

Mr. Justice SUTHERLAND concurs in the result.

Mr. Justice BRANDEIS is of the opinion that, by refusing to hear and to consider evidence introduced or offered which bore upon the existence of probable cause, the Commission did not merely commit error, but deprived the petitioner of his liberty without due process of law in violation of the Fifth Amendment, because he was denied a fair hearing. *Tinsley* v. *Treat,* 205 U. S. 20, 28, 30. Compare *Chin Yow* v. *United States,* 208 U. S. 8; *Kwock Jan Fat* v. *White,* 253 U. S. 454; *United States* v. *Tod,* 263 U. S. 149.

Mr. Justice STONE took no part in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.